Supreme Court, U.S.
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No. 99-1560

IN THE

Supreme Court of the United States

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, individually and as Trustee of the JASON GROSFELD TRUST, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC. and THE CYPRESS GROUP, INC.,

Petitioners,

v.

WILLIAM WATERS and LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in following Supreme Court and Eleventh Circuit precedent permitting class counsel's fee award to be based on the gross amount of the settlement fund, where doing so resulted in a fee award representing a multiplier of only 1.05 on class counsel's actual lodestar investment in this seven-year litigation; where the district court found that defendants' tactics had prolonged the litigation and thereby helped reduce the number of claims filed against the fund; where class counsel conferred a substantial benefit on the class and would suffer a multimillion dollar loss if defendants' approach to fees were taken; where no class member objected to the fee award; where defendants, not class members, stand to receive 90% of the proposed reduction in the fee; where defendants expressly stipulated they had no objection to the fee award and advocated its reasonableness to the district court prior to dismissal of the jury; and where the district court conducted a thorough and independent fee determination and found the fee to be fair and reasonable?

2. Whether defendants should be permitted to appeal from that portion of their settlement agreement in which they expressly stipulated, in return for class counsel capping its fee request, that they would not object to a fee award up to the amount of the cap, where defendants expressly told the district court that the fee award requested was "well within the range of reasonable" and where defendants seek to keep all the benefits of their settlement agreement while simultaneously rejecting all its burdens? [Note: this question would become relevant only if the Court grants review of question No. 1, since the Eleventh Circuit affirmed the district court's fee award on the merits without determining whether defendants should be precluded from appealing their own settlement.]

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents and plaintiffs below (hereinafter "plaintiffs") respectfully request that the Court deny the petition for writ of certiorari filed on behalf of petitioners and defendants below (hereinafter "defendants").

STATEMENT OF JURISDICTION

Although the Eleventh Circuit affirmed the district court's fee award on the merits, neither the Eleventh Circuit nor this Court has jurisdiction to hear this appeal by defendants from their own stipulation of settlement. Settlement of an action renders the cause moot. *Lake Coal Co. v. Roberts & Schaeffer Co.*, 474 U.S. 120 (1985); *ITT Rayonier, Inc. v. United States*, 651 F.2d 343, 345 (5th Cir. 1981). "[M]ootness is a threshold jurisdictional inquiry." *Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114, 1121 (11th Cir. 1995). Thus, an appeal of a case which has been settled must be dismissed without consideration of the merits. *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928), quoting, *Nashville, Chattanooga & St. Louis Ry. Co. v. United States*, 113 U.S. 261, 266 (1885) (" 'a decree, which appears by the record to have rendered by consent, is always affirmed, without considering the merits of the cause' "). Where, as here, a party stipulates to a comprehensive settlement, without explicitly preserving a right to appeal a particular issue, there is no right of appeal. *See, e.g., Association of Community Organizers for Reform Now ("ACORN") v. Edgar*, 99 F.3d 261, 262 (7th Cir. 1996); *Walsh v. Ford Motor Co.*, 945 F.2d 1188, 1192 (D.C. Cir. 1991) (Ginsberg, J.); *Shores v. Sklar*, 885 F.2d 760, 762 (11th Cir. 1989). A party cannot stipulate to a judgment, even under protest, and preserve the right of appeal. *Donovon v. Penn Shipping Co.*, 429 U.S. 648, 650 (1977); *Hattaway v. McMillian*, 903 F.2d 1440, 1451 (11th Cir. 1990).

STATUTES INVOLVED

The issues raised by the petition implicate neither any federal statute nor statutory policies. As noted in the Eleventh Circuit opinion below, The Private Securities Litigation Reform

Act of 1995 ("PSLRA") is inapplicable to this case which was brought under the Commodity Exchange Act ("CEA"), involved no securities and was filed long before enactment of the PSLRA.

STATEMENT OF THE CASE

A. Introduction and Summary

This class action arose from the fraudulent sales activities of a South Florida telemarketing boiler room called MultiVest Options, Inc. ("MOI"). MOI, and its parent, International Precious Metals Corporation ("IPMC"), had a long-standing history of serious problems with regulatory authorities, including the Commodity Futures Trading Commission ("CFTC"), the governmental agency charged with regulating commodity sales, and the National Futures Association ("NFA"), the industry's self-regulatory body that works in conjunction with the CFTC. In January 1990, the CFTC sued MOI for company-wide, management supervised fraud in the sale of Exchange — Traded Options ("ETOs"), causing the company to stipulate to a permanent injunction and to go out of business. (RA at 110a-111a, 225a-226a)[1] NFA rules still require any commodity firm employing former salespersons of MOI to adopt "stringent supervision procedures . . . in order to ensure that the improper training [these salespersons] have previously received does not taint their sales efforts on behalf [of their firm]." *National Futures Ass'n Manual*, Vol. 6, No. 2 (as of January 1, 2000) at ¶ 9021, Compliance Rule 2-9, Supervision of Telemarketing Activity. (RA at Q)

James Grosfeld, through a holding company called MultiVest, Inc. ("MVI") owned and controlled 100% of both IPMC and MOI. Numerous documents found in Grosfeld's files document his awareness of, and participation in, the fraudulent practices of his companies. (RA at 225a-233a) Upon filing of the CFTC complaint, Grosfeld fraudulently transferred millions of dollars in assets of the holding company MVI to himself and

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1. Citations to documents included in Petitioners' Appendix are cited as "PA at ___." Citations to documents included in Respondents' Appendix are cited as "RA at ___."

his minor son without consideration. (*Id.* at 227a) As with most boiler room operations closed by the CFTC, MOI was largely a bankrupt shell having almost no assets to pay customer claims. At the end of the day, MOI lost its customers over $120 million, $100 million of which went to MOI as commissions. (*Id.* at 236a-237a)[2]

This class action was commenced in April 1990 to recover investor losses from Grosfeld. The very day plaintiffs filed their complaint, Grosfeld began transferring over $30 million (later, over $50 million) — without consideration — into a tenancy by the entirety with his wife, an effort which the district court found to be motivated by Grosfeld's "actual intent" to defraud the plaintiff class by leaving them with nothing more than a "paper judgment." (RA at 108a, 114a)

Defendants' assertions that the district court improperly certified a "churning" case, while irrelevant to this fee dispute, are contrary to the record evidence. The problems at Grosfeld's companies were not due to a few salespersons "churning" accounts; they were the result of a management-supervised program of training salespersons to cheat customers. (RA at 22a-36a) Indeed, a unanimous panel of the Eleventh Circuit, after requesting a response from plaintiffs, denied defendants' earlier writ petition seeking to decertify the class as being improperly based on a "churning" claim. (*Id.* at P)

Defendants' assertions, that it is "without contradiction" that plaintiffs precluded early resolution of the case by assuming unreasonable settlement positions, are also belied by the record.

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2. Telemarketing boiler room fraud — where small investors are typically left with worthless claims against a defunct, bankrupt corporate shell — is one of Congress' concerns under the CEA. By the time the CFTC finally shut down MOI, the problem had become so acute that Congress convened hearings on the matter. *The Nature and Extent of Telemarketing Fraud and Federal and State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer and Monetary Affairs Subcommittee of the Committee on Government Operations, House of Representatives*, 101st Congress, 2d Session, July 11 and 12, 1990.

(RA at H, I) Indeed, the district court specifically found that it was "Defendants [who] engaged in litigation tactics that substantially prolonged the case." (PA at S-6)

After seven years of contentious litigation, and on the eve of closing arguments after a five-month jury trial, defendants and plaintiffs agreed to settle. A $40 million fund was created to pay the claims of class members, with unclaimed amounts reverting to Grosfeld. Because attorneys' fees are the single largest claim against a class action settlement fund, and because the lodestar amounts for both sides were enormous given the length and intensity of the litigation, Grosfeld wanted class counsel to cap their fee request so as to give him more certainty regarding his likely payout. Conversely, class counsel wanted the settlement to end all disputes between the parties including disputes and related appeals over the fee and expense award. The parties expressly agreed, therefore, that class counsel would *limit* their fee request to a third of the total fund plus expenses, and that *in return* defendants would not object either "directly or indirectly" to a request in that amount. (PA at G-36) Both sides advocated approval of the settlement to the district court: defendants expressly told the district court that the settlement, after deduction of the fee and expense request, would provide an "exceptional" recovery to the class and that a fee request of one-third of the gross settlement fund would be "well within the range of reasonable." (PA at A-10 n.9; PA at S-3 n.3 & S-4; RA at 44a, 50a-51a)

After obtaining preliminary approval of the settlement and dismissal of the jury, defendants began reneging on their stipulations in order to create a larger reversion for Grosfeld. First, defendants objected to plaintiffs' request that the settlement administrator use an outside service to update stale addresses for class members who would be entitled to file claims. Second, defendants objected to, and then appealed from, the district court's award of fees and expenses to class counsel. Third, defendants sought to erect barriers to class members receiving their shares of the settlement, leading to two separate appeals currently pending in the Eleventh Circuit.

In short, defendants engineered a premeditated breach of their own settlement in order to derail an imminent jury verdict and obtain the benefits of their settlement including their negotiated cap on class counsel's fees, the reversion they now enjoy and dismissal of all claims. Their downside thus protected, defendants now seek this Court's assistance in rescinding their agreement on fees so as to create a larger reversion for themselves (90 cents of every dollar) and a multimillion loss for class counsel. Both the district court and the Eleventh Circuit rejected this unfair result, noting that the $13.3 million fee award represented a modest multiplier of only 1.05 on class counsel's actual lodestar investment in this case of over $12.6 million (PA at A-13) — this, after class counsel assumed the enormous risk of funding this matter through seven years of litigation, a five-month jury trial, and now three years of fighting defendants' frivolous appeals from their own settlement.

Against this background, defendants' assertion that it is plaintiffs' counsel who have "manipulated" the settlement process is transparently not credible, as both the district court and the Eleventh Circuit determined. In its final order rejecting defendants' efforts, the district court found that defendants' arguments were "frivolous," that defense counsel's testimony regarding comparative fees in other cases was based entirely on hearsay and was "not credible" and that defense counsel's statements concerning the unprecedented nature of the fee award directly "conflict[ed]" with his earlier statements in seeking the court's approval of the settlement. (PA at S-1, 3 n.3, 4) Similarly, a unanimous panel of the Eleventh Circuit found that "defense counsel's arguments about the 'exorbitant and unprecedented fee award,' . . . are in conflict with their earlier assertions to the district court" and that defense counsel's claimed interest in protecting the class "strains credulity" given that defendants are in reality seeking return to themselves of approximately 90% of any reduction in class counsel's fee. (PA at A-10 n.9, 13)

Further undermining the credibility of defendants' position is the fact that the American Association of Retired Persons ("AARP"), the largest consumer lobby group in the United States, filed a brief in the Eleventh Circuit supporting plaintiffs' fee award and rejecting each of defendants' arguments as undermining the economic incentives that would motivate class counsel to bring these types of cases against the operators of telemarketing boiler rooms. (RA at L) Indeed, if the Court adopted the rigid rule advocated by defendants — that district courts must always limit fees to a portion of the fund actually claimed by class members — telemarketing firms could cheat consumers without fear of civil liability so long as they stole relatively small amounts from each customer so as to minimize the likelihood of claims. That is precisely what Grosfeld did here; he then engaged in time consuming scorched earth litigation tactics. Only after class counsel had been forced to spend millions of dollars and only on the eve of an adverse verdict, did he agree to settle. No reasonable class counsel would undertake this type of risk and expense if fees were wholly based on the number of claimants who may come forward (years after the fraudulent transactions in question) to claim their shares of any settlement.

Despite resounding rejection of their position by the district court, by the largest consumer lobby group, by a unanimous panel of the Eleventh Circuit and by the failure of a single sitting Eleventh Circuit judge to vote for rehearing *en banc*, defendants continue their calculated charade in this Court where — yet again — they grossly distort the factual and procedural history of the case, make factual assertions nowhere supported in the record, make arguments directly contrary to arguments made below and cite to declarations stricken from the record by the Eleventh Circuit as having been improperly filed for the first time on appeal. It is defendants' tactics, not this fee award, which give lawyers and the legal profession a bad reputation.

Defendants urge this Court to accept unsupported and internally contradictory assertions as bases for eliminating a

district court's discretionary authority to consider all relevant factors in making fee determinations. There is no reason for this Court either to change the well-developed rules in this area or to review the instant fact-bound individualized fee determination. All precedents, including Supreme Court precedents, teach that district courts have broad discretion in setting an appropriate fee award and that courts are permitted to base the award on the total benefit achieved for the class, not just that portion of the benefit actually claimed by the class — a factor over which class counsel has no control.

There is no conflict in the circuits over this issue. Notwithstanding defendants' repeated reference to "coupon" settlements, this was *not* a "coupon" settlement; every class member who filed a timely claim has received approximately 20% of his or her out-of-pocket loss in cash and fully-secured, interest bearing promissory notes, with the average recovery being $1,200 and with some class members receiving in excess of $20,000. There is no important issue of federal law for this Court to decide in this case; the decision below was based on a long-standing and demonstrably sound "abuse of discretion" standard. Where, as here, the fee award barely covered class counsel's actual lodestar invested in the case, through seven years of litigation and five months of trial, there can be no abuse of discretion. Nor is any federal statute implicated. Defendants' citation to the PSLRA is disingenuous as this case involved no securities, but was brought under the Commodity Exchange Act ("CEA"), which has exclusive jurisdiction over the regulation of ETOs. Eliminating telemarketing fraud has been one of Congress' primary concerns under the CEA.

Moreover, as noted by the Eleventh Circuit, it would be singularly inappropriate for a court "to renegotiate on [defendants'] behalf the terms of an agreement concluded after arms-length negotiations." (PA at A-17) Defendants' continuing efforts to increase the monetary reversion to a boiler room operator by reneging on their agreements and disavowing representations they made to the district court to obtain approval of the settlement — all under the sanctimonious guise of championing the interests of the very class members they defrauded — should not be rewarded.

B. The Settlement

At or about the time the trial began in September 1996, defendants and plaintiffs discussed a settlement. It was during these lengthy and ongoing discussions that *defendants* — not plaintiffs — insisted on a reversionary settlement. (RA at 161a-162a)

The settlement stipulation provided that Grosfeld would create a settlement fund against which claims could be filed by class members and from which the fees and expenses of plaintiffs' class counsel and the settlement administrator would be paid. (PA at G-11, 12, 29-31) Of this amount 25% was to be paid in cash. (*Id.* at G-12) The remaining 75% was to be paid in the form of an interest-bearing master promissory note secured by an irrevocable letter of credit from a prominent national bank. *Id.* The settlement provided for a plan of allocation among class members who timely filed claims with a third-party settlement administrator in relation to each class member's recognized loss as a percentage of the settlement fund as a whole. (*Id.* at G-29) Any amounts not claimed by class members or used to pay the fees and expenses of counsel and the settlement administrator were to revert to Grosfeld. (*Id.* at G-27, 28)

Defendants expressly agreed not to object to a fee of up to one third of the *gross* settlement fund amount, plus expenses, *in return* for plaintiffs' agreement not to request a larger fee:

> "Plaintiffs' Class Counsel of Record *shall* apply for fees in an amount *not to exceed* 33-1/3% of the *Settlement Fund* plus their costs and expenses. . . . Defendants will *not directly or indirectly oppose* Plaintiffs' Class Counsel of Record's application for fees and expenses or compensation of the Representative Plaintiffs." (PA at G-36) (emphasis added)

The stipulation also stated that it was a "final and complete resolution of all disputes," (*Id.* at G-41), reached "voluntarily" (*Id.*) and that defendants "shall not attack this Stipulation in the settlement approval process." (*Id.* at G-21).

The parties also drafted and stipulated to a form of class notice that expressly told class members that counsel would be requesting a fee and expense award of one-third of the gross settlement fund amount, plus expenses, that class members would receive no more than 20% of their recognized losses if the fee request were approved, that any unclaimed amounts would be returned to defendants and that defendants would not be objecting to the requested fee. (PA at H-8, 16, 17, I-2)[3]

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3. Defendants' accusations that the co-drafted class notice was misleading rests on the absurd notion that the notice should have anticipated the number of claims that would be filed and then compare the value of those claims to the fee request. Defendants argued in the Eleventh Circuit that plaintiffs' counsel had prior notice of a letter from the settlement administrator estimating a claims rate. Plaintiffs' counsel demonstrated below that this accusation was false and that the letter to which defense counsel referred was a letter that only defense counsel had received in *ex parte* communications with the settlement administrator. Indeed, plaintiffs demonstrated that it was defense counsel who withheld that letter from both plaintiffs' counsel and the district court until after obtaining preliminary approval of the settlement and dismissal of the jury. When confronted with these facts by the district court, defense counsel had to admit on the record that the letter had been sent solely to him prior to finalization of the settlement. (RA at 247a). Defendants similarly argued below that plaintiffs' counsel knew from the experience of claims filed in MOI's CFTC receivership proceedings that few class members would file claims against the settlement fund. Plaintiffs' counsel demonstrated below that this assertion is also false. The CFTC receiver had few if any funds to distribute and still received thousands of claims even though the receivers' notice cited statute of limitation defenses and strongly discouraged claims from all customers others than those trading ETOs during the last two years of MOI's 5-year existence. (RA at 154a). Here, by contrast, a $40 million fund was created and every class member filing a claim was assured of receiving approximately 20% of his or her out-of-pocket losses. With an average recovery of $1200, there was every reason to believe class members would have incentive to file claims. And, of course, defendants never told the district court they believed few class members would file claims; they instead urged approval of the Settlement as being fair and reasonable to the class.

The parties also drafted a proposed claim form that class members would use to submit claims against the settlement fund. In these negotiations, plaintiffs demanded and received a provision which prohibited the settlement administrator from rejecting any incomplete or inaccurate claim so long as the claim form could be corrected by the settlement administrator with information available from plaintiffs' counsel or MOI's records. (PA at G-33, 34)[4] Additionally, plaintiffs demanded and obtained a provision establishing a toll-free line to the settlement administrator so that class members could call the settlement administrator for instructions on how to complete the claim form. (RA at 20a)

Although the parties successfully negotiated a complete set of settlement documents, they had difficulty agreeing upon an amount for the settlement fund. On the eve of closing arguments defendants finally offered to fund the settlement with $40 million. Defendants' prior offers had been below that amount by in excess of $10 million. (RA at 152a)

C. Preliminary Approval of the Settlement and Dismissal of the Jury

When the district court learned of the settlement, it specifically asked whether the amount of attorneys' fees that would be requested had been "worked out" by the parties. (RA at 5a-6a) The district court was told that the parties had agreed that plaintiffs' counsel could — without objection — request a fee amount of up to 33-1/3% of the $40 million settlement fund plus costs. (*Id.*)

For several days, the district court conducted a series of hearings and conferences to review the details of the settlement. While some of these conferences took place in chambers off

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4. In fact, one of the related appeals that defendants are currently pressing in the Eleventh Circuit challenges the district court's order instructing the settlement administrator to allow those claims of class members who filed incomplete claim forms capable of correction. This is all part of defendants' overarching strategy to renege on every part of their settlement agreement requiring payments to class members and class counsel.

the record or by telephone, the court later recited on the record various statements which defendants now deny making, although defendants did not dispute them at the time they were put on the record. At no time during these discussions did defendants indicate they believed only a small portion of the class would file claims or that any part of the settlement agreement, notice or claim form was misleading or unfair. Defendants did not then tell the court they were forced into a "clear-sailing" agreement. To the contrary, defendants' settlement counsel vociferously argued that even after deduction of the proposed fee the settlement would produce "an exceptional benefit to the class members." (PA at A-10 n.9; RA at 44a) Indeed, the parties *jointly* presented the district court with a study done by the National Economic Research Association ("NERA") as supporting the fairness of the settlement and reasonableness of the fee request. (PA at A-8 n.7; S-3-4 & n.3) Defendants' counsel, when asked about the fee, assured the district court that "a fee of one-third the gross amount of the settlement fund would be well within the range of reasonable." (PA at A-8 n.7, 10 n.9; RA at 50a-51a)

After several days of exhaustive review, discussion and modification of the settlement, the district court held a hearing in open court, at which time plaintiffs' settlement counsel, set forth the basic terms of the settlement and summarized some of the in-chambers discussions. When the district court asked defendants if they had anything to add, defense counsel affirmed that Plaintiffs' counsel had correctly outlined the settlement and that he had *nothing* further to add. (RA at 22a)

The district court then entered the stipulated preliminary approval order and told the parties it was dismissing the jury. (*Id.* at 36a-38a) That order *again* expressly states that defendants are *not* objecting to the fee and expense request. (PA at B-8)

D. Defendants' Breaches and the District Court's Fairness Hearings

Having locked class counsel into their negotiated fee cap through entry of the preliminary approval order and dismissal of the jury, defendants then began to undermine and renege on their agreements. First, they attempted to minimize the number of claims filed by class members by objecting to the settlement administrator's use of an address locator service — requiring the district court's intervention. (RA at 246a-247a) Then, defendants urged the district court to wait to see how many claims were actually filed against the settlement fund and only award plaintiffs' class counsel a percentage of the amount actually claimed, as opposed to a third of the fund created as they had stipulated. (*Id.*)

Out of a class of approximately 20,000 individuals, the court received only one objection to the settlement. (PA at A-10 n.9; RA at 249a) That objector told the district court she did *not* object to class counsel's fee and expense request. (*Id.*) Furthermore, no class member intervened or appealed the district court's final approval order.

At the March 31, 1997 fairness hearing, the district court reviewed the history of the case, including the in-chambers, off-the-record discussions, noting that even defendants had agreed that the settlement, after deduction of fees and costs, would "produce an exceptional benefit to the class members." (RA at 44a) The district court went on to note that defendants had — prior to the jury's dismissal — expressly supported the reasonableness of the fee:

> "Now, I do want to note that the settlement's stipulation that the — excuse me, that the fee request of one-third of the settlement fund is the maximum amount of fees that the parties agreed — the parties, that's both sides — agreed could be sought pursuant to the settlement stipulation that the Court approved at the end of January, *after being assured by both sides that a fee of one-third of the gross amount of*

> *the settlement fund would be well within the range of reasonable.*" (*Id.* at 50a-51a (emphasis added))

Defendants' counsel took no issue whatsoever with the district court's summary of what they had previously said during the in-chambers, off-the-record preliminary approval discussions. In fact, moments later when asked whether defendants wanted to comment on any of the matters being covered, defendants' counsel said they had only one comment concerning the request of the lone objector for an extension of time in which class members could make claims. (*Id.* at 60a)

Defendants' assertions that the district court never made such a statement *until* two months later in its May 8, 1997 order, and that the court fabricated its statements in that order are deplorable falsehoods rejected by the Eleventh Circuit.[5]

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5. Defendants tell this Court that the district court was "mistaken" in its attribution of these statements to defendants' counsel. Petition at 29. By contrast, defendants told the Eleventh Circuit that the district court had "purposefully" erred in making these statements. (PA at U-3) In any event, the district court did not merely put these statements in its May 8, 1997 order; as noted above, it put them on the record — without objection from defendants — at the March 31, 1997 fairness hearing. In the fall of 1998 when the case was on appeal, defendants' counsel submitted the three declarations which they now cite to in which they claim they never made these statements. (PA at T-11-20) The Eleventh Circuit struck those declarations from the record as being an improper attempt to introduce evidence for the first time on appeal. (PA at V) Defendants nevertheless refer this Court to those declarations without noting that those declarations were filed only as part of their appeal. Petition at 29 n.32. When confronted with their failure to object to the district court's statements at the March 31, 1997 fairness hearing, defendants told the Eleventh Circuit that they had, in fact, objected to those statements in connection with their April 21, 1997 motion to alter or amend the judgment. (PA at X-26) Defendants, however, misleadingly cited the Eleventh Circuit not to the declaration filed on April 24 (which, in fact, said nothing about the district court's March 31 statements) (PA at O), but to declarations which they filed with the district court only *after* the district court entered and faxed its May 8, 1997 order

(Cont'd)

The district court noted that defendants sought to back out of their obligations under the agreement, while obtaining all the benefits and imposing a multimillion dollar loss on class counsel. (RA at 91a-92a) Contrary to defendants' assertion that the district court was misled, the court expressly understood that a significant portion of the settlement fund might not be claimed. (*Id.* at 99a) (The Eleventh Circuit flatly rejected this linchpin of defendants' entire argument. (PA at A-7-8 & n.7)) The district court also noted that even fewer class members would have been able to claim but for plaintiffs' counsel's efforts to obtain an order requiring the settlement administrator to use a locator service to resend claims packets to persons whose addresses had been stale. (RA at 96a-101a)

The district court addressed each of defendants' objections and methodically went through the relevant fee determination factors, noting that most resulted in an upward adjustment of the normal fee benchmark. (PA at A-6-7; RA at 96a-101a)

The district court had before it not only the NERA study of nationwide fee awards, but the declaration of an expert in complex commodities litigation. (RA at G) The declaration noted the difficult groundbreaking nature of this class action suit against the upstream operators of a defunct commodity telemarketing firm and demonstrated how favorably the results in this action compared to other private commodities litigations and CFTC restitution programs. (*Id.*) The district court awarded plaintiffs' counsel a fee award of one-third of the $40 million settlement fund or $13.3 million, with $5 million of this amount to be payable in cash and the remainder to be payable as a deferred obligation.

(Cont'd)

and officially closed the case file. (PA at P, Q, R; RA at J, N) In short, defendants never disputed the district court's March 31, 1997 statements until after the case was closed in May, and the Eleventh Circuit agreed that defendants' representations on appeal are "in conflict with their earlier assertions to the district court." (PA at A-10 n.9).

On April 25, 1997, the district court held a hearing to resolve plaintiffs' counsel's expense requests. Three days before that hearing, and long after the March 17, 1997 stipulated deadline for filing objections had expired, defendants filed a motion requesting the district court to alter or amend its prior fee award. (PA at L) Notwithstanding that defendants and plaintiffs had jointly provided the district court with the NERA study when asking the court to approve the settlement, defendants now attacked the district court's reliance on that study, claiming to have done a telephone survey of *unidentified* counsel supposedly involved in the cases included in that study, and concluding from their own "hearsay" survey that the fee and expense award was "excessive." (PA at M, O-7) At the end of this hearing, the district court again expressed displeasure that defendants were now taking positions contrary to those taken in chambers: "the NERA study was offered by *both sides* . . . as authoritative; . . . it was represented to me that the fee award sought was well within the range of common practice in these types of cases. . . ." (emphasis added) (RA at 104a) Again, defendants did not dispute they had made these statements in seeking the court's preliminary approval of the settlement.

In its May 8, 1997 final order denying defendants' motion to alter or amend the fee award, the court found that the motion was "frivolous." (PA at S-1) The court also noted that defendants' evidence in support of the motion (namely their continuing unsupported claim that the award is 400% greater, relative to class distributions, than any prior case) was based entirely on hearsay, that it was inconsistent with defendants' counsel's prior representations, and that it was defendants' counsel who previously had advocated the NERA study as supporting the proposed fee: "in those discussions, counsel for both sides assured the Court that their experience and the findings contained in the NERA Study would support an attorneys' fee award in [the amount of $13,333,333]." (*Id.* at S-3 & n.3, 4) The district court even noted that it had personally telephoned the author of the NERA study who contradicted the representations that defense counsel

was making about the information contained in the report. (*Id.* at S-4, 5) The district court therefore rejected defense counsel's testimony as being "not credible." (*Id.* at S-4)[6]

The district court also noted that a fee award based solely on the number of claims actually received would reward defendants for having unnecessarily prolonged the litigation knowing that the claim rate decreases with the passage of time. (*Id.* at S-6) The district court also noted that it would be "highly inequitable" under the circumstances of this lengthy and expensive case to adopt defendants' position. The court noted that its analysis at the March 31, 1997 fairness hearing required an upward adjustment to the fee benchmark. (*Id.* at S-6-7)

E. Defendants' Appeal

Defendants then appealed from their settlement agreement, claiming that they had been "coerced" into their agreements by overreaching class counsel and a "contumacious" district court. Recognizing that the record undermined their arguments, defendants attempted to create a new record on appeal first by filing declarations in the district court after the case was closed (PA at P, Q, R) and then by submitting declarations in the Eleventh Circuit purporting to take back the statements which they had made to the district court in seeking preliminary settlement approval and which the district court had then put on the record without objection. (PA at T-11-20) The Eleventh Circuit ordered the declarations filed for the first time on appeal stricken from the record and ordered defendants to submit a new brief deleting those references. (*Id.* at V) Defendants again made reference to the declarations in their revised brief and

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6. Defendants now — for the first time — complain that the district court made *ex parte* contact with the author of the NERA study. Defendants' complaint is disingenuous given that defendants' counsel, who submitted the declaration regarding the settlements in the NERA study, failed to show up at the hearing for questioning or cross-examination. This incident only highlights that the district court vigorously exercised its duty to conduct an independent investigation of the reasonableness of the fee request.

again the Eleventh Circuit ordered their brief stricken. (RA at K) A unanimous panel of the Eleventh Circuit affirmed the district court's fee award. (PA at A) When defendants requested a rehearing, with a suggestion of rehearing *en banc*, not one judge of the Eleventh Circuit voted to hear the case. (*Id.* at F) The Eleventh Circuit also denied defendants' request for a stay of mandate pending their petition to this Court for a writ of certiorari. (RA at A)

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Propriety Of A Particular Fee Award Is A Fact-Bound Decision, Determined On A Case-By-Case Basis And Reviewed Only For An Abuse Of Discretion.

The Court would be ill advised to adopt the rigid, formulaic standard which defendants propose should govern fee awards. It is Hornbook law that district courts have "broad discretion" in determining an appropriate fee award on a case-by-case basis. "[I]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939); *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

Defendants' latest theme — raised for the first time in their petition to this Court — is that "reversionary" settlements are part of a "scandalous" "scheme plaguing the federal courts" for the purpose of "enriching" class counsel. Petition at 3, 26, 28. By contrast, defendants argued to the Eleventh Circuit that reversionary settlements are "very rare." (PA at W-30) Both here and in the Eleventh Circuit, defendants have argued that class counsel manipulated the settlement in order to generate an "exorbitant" fee at the class' expense. But in the district court, of course, defendants urged approval of the settlement as being fair and reasonable to the class.

Defendants' ever-changing situational arguments have one thing in common: they are all totally lacking in any evidence suggesting collusion, manipulation or other unfair practices designed to harm the interests of class members. Both the district

court and the Eleventh Circuit concluded that the settlement was the result of vigorous arms-length negotiations. (PA at A-5 n. 4, 17) Similarly, the AARP, as spokesperson for millions of older American consumers, is not in the habit of filing amicus briefs supporting fee awards to class counsel who have engaged in "schemes" to enrich themselves at the expense of their consumer clients.

There is absolutely no basis to conclude that reversionary settlements are part of a "scheme" or are generally unfair. As noted by Professor Newberg, reversionary settlements are one of several commonly accepted methods for dealing with unclaimed funds. 2 H. Newberg and A. Conte, *Newberg on Class Actions* (3d ed. 1992) (hereinafter "*Newberg*") § 10.15 at 10-38, § 10.17 at 10-40 & n.124 (collecting cases). Indeed, many of the leading cases discussing class action fee awards involved reversionary settlements. *Camden*, 946 F.2d at 771 n.2; *Skelton v. General Motors Corp.*, 860 F.2d 250, 254 n.1 (7th Cir. 1988); *In re Crazy Eddie Secs. Litig.*, 824 F. Supp. 320, 323, 326 (E.D.N.Y. 1993) (reversionary settlement where the court awarded $14.2 million in fees representing 33.8% of the gross amount of the $42 million settlement fund, plus $2 million in expenses, in a case where there was no trial). There is authority that even where the defendant's liability to the class has been proven, any unclaimed portion of the judgment amount should revert to the defendant and should *not* be distributed *pro rata* to class members who did file claims. *See, e.g., Van Gemert v. Boeing Co.*, 739 F.2d 730, 736-37 (2d Cir. 1984); *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815-816 (2d Cir. 1977); *see also* 2 *Newberg* § 10.20 at 10-52. These cases reason that the equitable interest in the unclaimed funds belongs to the class members who have *not* claimed, and that class members who have claimed are no more entitled to those funds than is the defendant.

Indeed, defendants' underlying assumption — that all funds are automatically distributed to class members in the absence of a reversionary settlement — is plain wrong. "Most class actions result in some unclaimed funds," the disposition of which

is left in the district court's discretion. *See, e.g., Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (discussing the various alternatives used by courts for distributing such funds). Some courts permit the shares of non-claiming class members to be distributed *pro rata* to class members who have claimed their shares. *Id.* at 1307 n.4. Other courts, however, find there is no just reason to give claiming class members a windfall by allowing them to capture the shares of nonclaiming members as well. *See Van Gemert*, 553 F.2d at 815 (rejecting this approach as an improper "fluid class" recovery). Courts have reached various solutions — including *cy pres* distribution to a next best class, reversion of unclaimed balances to the defendant and escheatment of unclaimed balances to the government. *Six Mexican Workers*, 904 F.2d at 1307-08. *See also* 2 *Newberg* §§ 10.15, 10.16, 10.17, 10.19, 10.20.

In other words, district courts are often called upon to exercise their equitable discretion in allocating unclaimed balances. Class counsel are never penalized by having to return a portion of their fee award when unclaimed balances remain at the end of the claims process and the district court determines that those funds should revert to the defendant, escheat to the government or be distributed under the *cy pres* doctrine. There is no reason why a different result should obtain here, where the district court at the time of final settlement approval made a determination that it would be fair, in the context of this settlement, for unclaimed balances to revert to the defendant.

Moreover, defendants' credibility is undermined by the very affidavit on which they rely to argue that the fee award at bar was 400% greater than the highest fee award ever made in the Eleventh Circuit. Defendants' counsel submitted an affidavit in the district court representing that defense counsel had made an *ex parte* telephone survey of the various lawyers involved in the twenty-nine settlements from the Eleventh Circuit contained in the NERA study. (PA at M) Counsel claimed that although thirteen (*i.e.*, 45%) of those twenty-nine settlements were

"reversionary," no unclaimed funds were left in *any* of those reversionary settlements. Defendants' counsel concluded, therefore, that the NERA study was, in fact, based on actual distributions, rather than the size of the fund created. But if — as defendants claim in their petition — class counsel knew, or should have known, that only a small percentage of the class would file claims, how is it that there were no unclaimed funds in any of the thirteen reversionary settlements contained in the NERA study? Either defendants are wrong about the claims history of the settlements in the NERA study or they are wrong in their assertion that only a small fraction of class members typically file claims. The district court rejected defense counsel's affidavit as being "not credible." (PA at S-4) We know, because the district court personally called the author of the NERA study, that the fee awards in those twenty-nine cases were based on the entire settlement fund created, without regard to whether the amounts were actually later distributed. Indeed, most fee awards occur at the time of final settlement approval, whereas the claims process often goes on for months or even years later. Thus, it would be unusual for a district court to know the final results of the claims process at the time fees are awarded.

Defendants' efforts to "chart" the disparate fee awards they claim result from reversionary as compared to *pro rata* settlements further demonstrates the absurdity of the rigid, formulaic rule they would have this Court adopt. It is not true that class counsel who creates a $40 million reversionary settlement fund will always receive the same fee as class counsel who creates a $40 million *pro rata* settlement fund. Where, as here, class counsel litigated a difficult and contentious case through seven years of litigation and a five-month jury trial, incurring an actual lodestar of over $12.6 million, a $13.3 million fee award (representing one-third of the $40 million settlement fund, which in turn represents one-third of the actual out-of-pocket losses of $120 million) was entirely reasonable. Every class member who submits a claim is entitled under this settlement, after deduction of fees and expenses, to receive 20%

of his or her out-of-pocket losses.[7] On the other hand, class counsel who obtains a $40 million *pro rata* settlement (based on out-of-pocket losses of $700 million) after only a few months discovery and little invested in the case, would be entitled to a much smaller fee. In other words, whether the settlement is reversionary or *pro rata* is only one of many factors that the district court, and a reviewing court, must take into consideration in setting an appropriate fee award under all the circumstances of the particular case.

In this case, the average pay-out to class members filing a claim ($1,200) seemed sufficiently large to provide filing incentive. Indeed, it was a far larger average recovery than individuals typically receive in a class action. (RA at 136a, 154a) As Professor Newberg has noted, this factor typically results in a higher than average claim rate. *See 2 Newberg* § 11.18 at 11-24. Defendants — while downplaying the benefit created by class counsel — have admitted that class members typically receive only "2% to 10%" of their out-of-pocket losses from class settlements, even where the settlement agreement provides for a *pro rata* distribution. (PA at W-37). Here, by contrast, every class member who filed a claim has received approximately 20% of his or her out-of-pocket loss from this reversionary settlement. Individual class members do not care about the *total* amount claimed by the class as a whole; they care about the amount of their *individual* share. A recovery of 20% of out-of-pocket losses *significantly exceeds* the national norm. Notwithstanding defendants' repeated references and citations to "coupon" settlements, this settlement was *not* a "coupon" settlement; class members received cash and fully-secured, interest-bearing promissory notes, with some class members receiving in excess of $20,000 and numerous others receiving several thousands of dollars. Furthermore, provisions providing a formula for the distribution of the net settlement fund, after the payment of counsel fees and expenses, according to class members' recognized losses, as well as the filing of

7. Defendants admit this fact. (PA at Q-3, ¶8)

proofs of claim, are standard and accepted procedures in a class action settlement. 3 *Newberg* § 12.35 at 12-90.

II. There Is No Conflict Among The Circuit Courts Regarding This Court's *Boeing* Decision.

Struggling to create some issue worthy of this Court's review, defendants wrongly tell the Court that there is a split among the circuits on how to apply this Court's decision in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). Each circuit gives district courts broad discretion in determining fee awards and reviews fee determinations under an "abuse of discretion" standard. Whether a settlement is "reversionary" or "*pro rata*" is only one of many factors that district courts are permitted to consider in setting an appropriate fee.

In *Boeing*, this Court held that class counsel's fee award may be measured by the size of the common fund established for the benefit of the class and not merely by the value of the claims eventually asserted against the fund:

> "[Class members'] right to share the harvest of the lawsuit upon proof of their identity, *whether or not they exercise it*, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorneys' fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs." *Id.* at 480 (emphasis added).

Moreover, the Court noted that the result is the same notwithstanding that defendant may have a reversionary and "latent" interest in the funds, if unclaimed. *Id.* at 481-482. Once the fund was established for the benefit of class members, all class members held equitable interests in their respective shares of the fund. *Id.* In assessing fees, it was therefore proper for the district court to look at the entirety of the fund created for the benefit the class. *See also* 3 *Newberg* § 14.03 at 14-14.

Defendants' argument — that *Boeing* decided only whether it would be impermissible "fee-shifting" to base class counsel's fee on the entirety of the fund, and not whether fees must be based on the entirety of the settlement fund — proves too much. Of course, *Boeing* does not say fees "must" be based on the entirety of the fund, but the Court clearly held that it was "permissible" to base fees on the entirety of the fund. It is not impermissible "fee-shifting" to base a fee award on the entire fund because class members, whether they claim their shares or not, have "benefited" and hold an equitable interest in the fund that has been created through the efforts of class counsel.

Defendants' reliance on footnote 5 of this Court's *Boeing* decision, to distinguish between the judgment fund in *Boeing* and the settlement fund at bar, is misplaced. The defendants' liability in *Boeing* (where they had to pay the judgment fund into court subject to receiving a portion of it back in the event it was not all claimed) is logically no different than Grosfeld's liability here (to pay the full settlement amount to the settlement administrator with no right to return of any funds unless and until class members fail to claim their shares). Indeed, almost ten years ago, the Eleventh Circuit rejected this notion in the very decision in which it adopted the "percentage of the fund" method for calculating fees in a common fund case. *Camden*, 946 F.2d at 771 n.2. There, the court flatly rejected as having "no merit" the argument that basing counsel fees on the entirety of a reversionary settlement fund would constitute impermissible "fee shifting": "The settlement clearly created a common fund for the satisfaction of the County's liabilities." *Id.*; *accord Skelton,* 860 F.2d at 254 n.1 (rejecting the argument that defendant's right of reversion in a class settlement changed the "common fund" analysis). Whether or not defendants have a reversion, each class member has "an undisputed and

mathematically ascertainable claim" against the fund created on his behalf. *Boeing*, 444 U.S. at 479.[8]

Moreover, defendants' argument — concerning overreaching counsel and disproportionate fee awards — is the same misguided "public relations" argument which was initially adopted by the lower court in *Boeing* and then rejected by an *en banc* hearing of the court of appeal and later by this Court. *See Van Gemert v. Boeing Co.*, 573 F.2d 733, 735-36 (2d Cir. 1978) (criticizing large fee awards and holding that only the claimed portion of the fund could support a fee award), *rev'd en banc*, *Van Gemert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). The Second Circuit *en banc* decision which this Court affirmed in *Boeing* provides an even more detailed discussion of why defendants' position is untenable. The *en banc* panel noted that a contrary rule would unduly penalize either claiming class members or class counsel. *Van Gemert*, 590 F.2d at 440-41. To award class counsel a reasonable fee bearing some proportion to their effort, courts would be forced to reduce disproportionately the share of claiming class members in order to cover a fee that could be taxed only against those claimants' shares. *Id.* On the other hand, protecting claiming class members by limiting class counsel to a fixed percentage of the fund actually claimed would make the resulting fee entirely dependent on the number of plaintiffs who

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8. Indeed, the lack of impermissible "fee-shifting" is even more obvious in the context of a settlement where the defendant *agrees* that the fee may — without objection — be based on the entirety of the settlement fund. There has never been any legal principle precluding the assessment of fees against a defendant's latent interest where, as here, the defendant has agreed to that procedure. *See, e.g., Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) Defendants' other assertion — that the *Boeing* Court made clear that defendants' liability was "not subject to a reversion" (Petition at 21) — is obviously false. The Court expressly recognized this possibility, 444 U.S. at 477, 482, but expressed no opinion on the ultimate outcome. *Id.* at 482 n.8. In fact, all unclaimed funds in *Boeing* did revert to the defendant. *Van Gemert*, 739 F.2d at 733.

came forward — notwithstanding the difficulty of the case, the quality of representation or the hours spent by class counsel. *Id.* at 441. The panel also noted that because the number of plaintiffs who will come forward to claim their shares is unpredictable, class counsel would be discouraged from pursuing class suits, regardless of the merits of the case. *Id.* at 435, 441.

The decision of the Eleventh Circuit below is entirely consistent with *Boeing*. It held that class counsel's fee award may be, but need not be, based on the entirety of the settlement fund created for the benefit of the class. The court noted that district courts must look at the entire panoply of factors relevant to determining a proper fee under all the circumstances of the particular case. The court also noted that class counsel's fee in this case was only a "modest lodestar multiplier of 1.05%" over class counsel's actual lodestar of $12,663,897.

Contrary to defendants' assertion, the Ninth Circuit did not hold in *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997), that a district court must — as a matter of law — base a fee award on the total amount of a reversionary settlement fund. The Ninth Circuit held that under *Boeing* a district court "may" base the fee on the entire fund, *id.* at 1027, and that the district court had "abused its discretion" in that case, *id*, by limiting class counsel to a fee based only on the actual amounts claimed. The Ninth Circuit held that the district court should have based the fee either on the amount of the settlement fund created *or on the actual lodestar. Accord, Six Mexican Workers*, 904 F.2d at 1311 (noting that fees may be "assessed against every class members' share, not just the claiming members" and that the lodestar method should otherwise be used if "the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors").

Defendants' assertion that the Fifth Circuit in *Strong v. Bell South Telecomm., Inc.*, 137 F.3d 844 (5th Cir. 1998), held that only actual payouts should be considered is again wrong. Since

the Fifth Circuit bases fee awards on a lodestar, rather than a percentage of the fund method, the court found that this Court's decision in *Boeing* was inapplicable to the case. Moreover, unlike here, the court found that no common fund had been established on which to base a fee award. Instead, class members were to continue in a plan or receive credits for future telephone usage. Moreover, the court awarded plaintiff's counsel an amount "which exceeded the lodestar figure plus costs." *Id.* at 851.

There also is no confusion in the lower courts as defendants suggest. As the Eleventh Circuit noted in its opinion below, "no case has held that a district court must consider only the actual payout in determining attorneys' fees." (PA at A-9) The lower court cases cited by defendants were distinguished below as cases involving "coupon" settlements incapable of precise valuation, settlements involving no "common fund" because they were subject to further alternative dispute resolution procedures, or suits that were settled with little effort by plaintiffs' counsel and little benefit to class members. Moreover, each of those cases awarded class counsel an amount equaling or exceeding class counsel's actual lodestar. (RA at 275a-278a) The Eleventh Circuit agreed that the cases cited by defendants all "emphasize that attorneys' fee awards are in the discretion of the district court and . . . illustrate that whether a district court judge considers the total fund or the actual payment will vary according to the circumstances of each case." (PA at A-9 n.8)

III. This Case Presents No Important Issue Of Federal Law.

Defendants improperly invite this Court to create a "federal law" issue by rewriting the Private Securities Litigation Reform Act ("PSLRA") to cover futures contracts and commodities boiler rooms. This case, however, involves no securities, falls outside the jurisdiction of the PSLRA and under the exclusive jurisdiction of the CEA. 7 U.S.C. § 2(a)(ii) (CFTC has exclusive jurisdiction over commodity futures and options). The federal courts have repeatedly recognized that Congress did not intend

to apply the federal securities laws to commodity trading accounts. *See, e.g., Cohen v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 722 F. Supp. 24, 26-27 (S.D.N.Y. 1989) (collecting cases). Defendants neither dispute the CEA's exclusive jurisdiction, nor that this action was commenced years before the 1995 PSLRA.

The PSLRA is only relevant to demonstrate that Congress knows how to take legislative action in the area of fee awards if it deems such action appropriate, and that it chose not take such action with respect to the CEA.[9] To the contrary, Congress has created broad remedies under the CEA, not available under the securities laws, including express private rights of action for civil aider and abettor liability. 7 U.S.C. § 25(a). It has also made telemarketing fraud in the solicitation of commodity option customers one of the CFTC's highest priorities. 7 U.S.C. § 9(b).

Unable to address these fundamental principles establishing that the PSLRA is irrelevant to this case, defendants ask that the Court adopt their "policy" view that Congress intended the PSLRA to address "scandalous" "manipulation of reversionary settlements." (Petition at 24, 26) Of course there is no evidence of any such policy or of defendants' heretical subtext that Congress' intent was to apply this PSLRA provision to boiler room commodities class actions. To the contrary, this action raises none of the concerns that motivated Congress to enact the PSLRA — precluding securities strike suits that ultimately harm the interests of the very class members they purport to champion (*i.e.*, shareholders), by holding corporate treasuries ransom to class counsel based on innocent declines in stock prices. In a securities suit, class counsel may actually harm their own clients (*i.e.*, the shareholders of the company they are suing)

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9. *Cf. Meghig v. KFC Western, Inc.*, 516 U.S. 479, 484-85 (1996) (the inclusion by Congress of a remedy provision in one statute demonstrates that Congress knows how to draft such a provision and that it could have provided for such a remedy in an earlier enacted statute, if it wished to do so).

if they receive a fee from the corporate treasury that is greater than the amount of money they put into shareholders' pockets.

That is not true with respect to consumer claims, including CEA claims, brought against the operators of telemarketing boiler rooms. Class counsel in this case has not taken its fee from the corporate treasury in which any shareholder clients hold ownership interests. To the contrary, class counsel has generated a fund in which class members had no prior interest and which would not have existed but for counsel's assumption of the risk and effort needed to create the fund.

IV. Given The Facts At Bar, This Is A Singularly Inappropriate Case For Review.

Moreover, the factual background of this case makes it a singularly inappropriate vehicle for deciding the issues. Defendants' ever-changing arguments, their attacks on the integrity of the district court, their distortion of the factual record, their disavowal of representations made to the district court to obtain approval of the settlement and their reliance in this Court on declarations which have been stricken from the record, should not be rewarded.

No legal principle permits a party to modify or reform his or her stipulation of settlement so as to leave the settlement in place, but to rescind the fee agreement provision. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 726-28, 741 (1986) (reversing a court of appeals decision which had invalidated a negotiated fee provision while allowing the remainder of the class settlement to stand); *Williams*, 129 F.3d at 1027 (holding that fee award should be based on the total amount of the settlement fund and noting that defendants had no cause to object since they had agreed to that process in the settlement agreement); *Skelton v. General Motors Corp.*, 860 F.2d 250, 260 (7th Cir. 1988) (noting that a party cannot keep the benefits of his settlement, while appealing from an agreed-upon fee provision); *In re Copley Pharmaceutical, Inc. "Albuterol" Prod. Liab. Litig.*, 1 F. Supp.2d 1407, 1416 (D. Wyo. 1998) (basing class counsel's fee on the gross amount of the settlement fund, noting that

"defendant cannot complain now that class counsel seek to do what the settlement agreement explicitly contemplates").

Defendants' argument regarding the so-called "clear sailing" agreement is of no consequence to this petition. The Eleventh Circuit permitted defendants' appeal from their own settlement agreement and affirmed the district court's ruling on the merits. Moreover, nothing in the cases cited by defendants permits a party to appeal from his own agreement under the guise of protecting the class. Those cases merely hold that a private fee agreement between the parties to a class action settlement does not obviate a district court's independent responsibility to review the reasonableness of a fee request. The Eleventh Circuit found that the district court properly performed this duty.

Additionally, in *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), the lead opinion of Judge Oakes was *actually critical* of the analysis of "clear sailing" agreements which defendants cite to in Judge Newman's concurring opinion, noting it was based on an unrealistic view of the settlement process:

> "[W]here, as here, the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems to the author of this opinion that an agreement "not to oppose" an application for fees up to a point *is essential* to completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged. It is difficult to see how this could be left entirely to the court for determination after the settlement." *Id.* at 905 n.5 (emphasis added).

Defendants also cite *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) for the proposition that it is improper simultaneously to negotiate a class action settlement and an agreement on class counsel's fee award. This Court rejected this notion in *Evans v. Jeff D.*, 475 U.S. at 733-38, noting as did Judge Oakes in *Malchman*, that it is essential to the completion

of a settlement for a defendant to know the maximum exposure under the settlement. This, of course, is why defendants negotiated for the cap on class counsel's fees here. The Eleventh Circuit specifically noted — contrary to defendants' assertion that "clear sailing" agreements are pushed by class counsel solely to silence defendants — that the purpose of these agreements is "so that defendants have a more definite idea of their total exposure." (PA at A-3 n.3) Thus, defendants' assertion that they were "concerned" about discussing fee issues in the context of the settlement (Petition at 11) is nonsense.

In sum, the settlement fund achieved in this hard-fought case bestowed a benefit to the class that otherwise would have been unavailable. That not all class members claimed against the fund was — as the district court specifically found — partially of defendants' creation (due to delaying tactics and efforts to prevent the remailing of class notices) and partly due to the district court's crowded docket (over which plaintiffs had no control). (PA at S-6) The district court specifically found that it would be "highly inequitable" under the circumstances of this case to saddle class counsel with a multimillion loss for circumstances over which they had little or no control. (*Id.*)

CONCLUSION

The Court should deny the writ.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION OF APPELLANTS FOR STAY OF ISSUANCE OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI DATED AND FILED JANUARY 24, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-5074

WILLIAM WATERS, LINDA BARTHOLOMEW, individually, and on behalf of all others similarly situated,

Plaintiffs-Appellees,

versus

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INCORPORATED, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ORDER:

(X) The motion of Appellants for (x) stay . . . of the issuance of the mandate pending petition for writ of certiorari is DENIED.

* * *

/s/ STANLEY F. BIRCH, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX B — EXCERPTS FROM VOLUME 52 OF TRANSCRIPT OF TRIAL PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JANUARY 27, 1997

[commencing at page 8256]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-Civ-UNGARO-BENAGES

WILLIAM WATERS and LINDA BARTHOLOMEW,

Plaintiffs,

– v –

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

Miami, Florida
January 27, 1997
9:07 a.m.

VOLUME 52

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE URSULA
UNGARO-BENAGES
U.S. DISTRICT JUDGE, and a jury

* * *

Appendix B

[8257] * * *

(Call to order of the Court)

THE COURT: Okay. Good morning.

Do you need appearances, Bill?

THE REPORTER: No.

THE COURT: Okay. Well, Mr. Goteiner called the chambers this morning and said you all had reached a settlement. Of course, this is a 23(b)(3) class action and reaching a settlement isn't all that easy. So, I mean, I'm willing to listen, but my inclination is to say sorry, guys, too late.

I'm willing to work with you possibly and possibly take a sealed verdict and let you try on getting the papers done after closing arguments while the jury is deliberating. But then, of course, that would have to be disclosed in the notice to the class as part of the disclosures so that they could make an informed decision as to whether or not they [8258] wanted to object.

MR. GOTEINER: Your Honor, if I may.

THE COURT: Yes.

MR. GOTEINER: While the papers have been drafted, except the motion for preliminary approval, what's been happening is since the trial began the parties have engaged

in the long settlement process, and it just so happened that last night late a resolution was reached.

A couple of things. One is we'd like your Honor to consider the settlement, and we would also like your Honor to agree not to sua sponte recuse yourself by hearing the settlement.

THE COURT: Well, if that's the joint request by everybody, of course, that's okay with me.

Is that a joint request or not?

MR. KAMINSKY: Yes.

MR. BONNER: Yes, your Honor.

THE COURT: That's a joint request. Okay.

MR. GOTEINER: What we would recommend to the Court is that since the papers are drafted and signed, we could submit them to the Court and allow the Court to consider them for as long as the Court needs. We obviously don't want to lose the jury from plaintiffs' point of view.

THE COURT: Needless to say, yes.

MR. GOTEINER: So, we would ask the Court to review [8259] the papers, suspend closing argument for a couple of days to see if the Court would grant preliminary approval, and if not, we would proceed with closing argument.

Appendix B

It doesn't seem to make sense to the parties to require the jury to sit here if the case can be settled.

We appreciate it's late in the day. That's sometimes the nature of these sorts of settlements. It's unusual.

MR. ANDERSON: If I may add something, your Honor, just because we knew that the Court's reaction would be exactly what it was, because we know of your concern about the jury.

This is a lengthy document. The devil is in the details. Every sentence of the document has been negotiated. We have not been working on it, those of us from San Francisco. We have people in San Francisco that have been doing it and the defendants have had Cravath, Swaine & Moore working on it. So it is a finely-honed document, but there are a lot of subtleties and intricacies.

THE COURT: Have the attorneys' fees all been worked out?

MR. ANDERSON: The language — well, the Court decides only if attorneys' fees —

THE COURT: Right. But do we know what the amount is that's being requested, what percentage of the total recovery that would represent?

MR. ANDERSON: Yes, your Honor. Not more than a [8260] percentage.

THE COURT: Yeah. Well, what is the percentage?

MR. ANDERSON: 33 percent.

THE COURT: Out of $40 million?

MR. ANDERSON: Yeah.

MR. GOTEINER: Plus costs.

THE COURT: Yeah. How much are the costs?

MR. GOTEINER: Your Honor, right now we'd rather not disclose that information, obviously, because we don't have a settlement.

THE COURT: Well, you must have disclosed it to Cravath, Swaine & Moore.

MR. GOTEINER: I don't think we have actually, your Honor.

MR. KAMINSKY: Yes, you have.

MR. GOTEINER: Did we? I wasn't at all involved in talking with Cravath, Swaine & Moore.

MR. ANDERSON: We have people in San Francisco and New York involved in it.

MR. KAMINSKY: I heard a number but I wouldn't want to say that's the number because I heard secondhand from my cocounsel in New York at Cravath.

MR. ANDERSON: We looked into the kind of fees that could be awarded, your Honor, but the Court can grant as much as it chooses. But where we have done as much as we have, not [8261] more than 33 percent is well —

THE COURT: I just want to get an idea of what the round numbers are and what the percentages look like. Yes, 33 percent is not an unusual percent in class actions generally, but, you know, it has to be looked at in relationship to what the class recovery was, what the exposure was in the case, the likelihood of recovering, et cetera, et cetera, et cetera.

MR. GOTEINER: We can briefly go through the terms, if your Honor wishes.

THE COURT: Well, I have to tell you, you know, it remains my — I think that probably this is the best we can do today, because — well, if you all were not involved in negotiating the settlement, you all can disclose. This was not a distraction to you.

MR. GOTEINER: Your Honor, we can do closing argument if the Court wishes. But we think in terms of judicial time, economy and also focusing on settlement, it would make sense to suspend argument for a day or two until the Court just reviews it — and the Court will need time to review the papers — and if the Court disapproves it, then we could proceed later this week.

* * * *

APPENDIX C — VOLUME 55 OF TRANSCRIPT OF TRIAL PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JANUARY 31, 1997

[commencing at page 8321]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-Civ-UNGARO-BENAGES

WILLIAM WATERS and LINDA BARTHOLOMEW,

Plaintiffs,

– v –

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

Miami, Florida
January 31, 1997
9:30 a.m.

VOLUME 55

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE URSULA
UNGARO-BENAGES
U.S. DISTRICT JUDGE, and a jury

* * *

Appendix C

[8322] * * *

(Call to order of the Court)

THE COURT: Okay. Good morning. I think we better get appearances this morning. Who is here for the plaintiffs?

MR. COOPER: John Cooper of the firm of Farella, Braun & Martel.

MR. GOTEINER: Neil Goteiner of Farella, Braun & Martel.

MR. WISOFF: Brandon Wisoff of Farella, Braun & Martel.

MR. NEWMAN: Jeff Newman of Farella, Braun & Martel.

THE COURT: Okay, fine. And for the defense.

MR. DODYK: Paul Dodyk of Cravath, Swaine & Moore.

MR. KAMINSKY: Martin Kaminsky of Pollack & Kaminsky.

MR. BONNER: Larry Bonner of Homer & Bonner.

THE COURT: Fine. You can all have a seat. Now, the reason we are all here is for the Court to take up the [8323] stipulations of settlement that's pending before the Court for preliminary approval.

Appendix C

Let me first say that I've been over everything, including all of the changes that were made this week. I think I understand the transaction. I would like the plaintiffs, however, to go through it with me one more time and talk a little bit about the thinking that has gone into all of this.

MR. COOPER: Thank you, your Honor. My name is John Cooper with Farella, Braun & Martel. I'm appearing as settlement class counsel on behalf of the class.

In about September, when this matter was starting trial, Mr. Dodyk and I started conversations to explore the possibility of settling this matter, and over the course of the months since then, we have reached agreement on all of the documents that are necessary to settle a Rule 23(b) class action, which includes the stipulations of settlement and the amendments that your Honor mentioned, the notice, the orders for preliminary approval, the summary notice.

In addition to that, your Honor, we negotiated the amount of the consideration, and we have agreed to a settlement in the amount of $40 million, which is made up of $10 million cash, which has been paid this morning, or will be paid after your Honor indicates approval, plus $30 million in promissory notes that would go to the class members that would bear the rate of interest that's offered by the National Bank of Detroit [8324] on certificates of deposit up to $100,000.

Mr. Dodyk and I addressed this issue, the issue of the interest rates, in chambers this morning with your Honor; and by telephone communication with the bank, it was

resolved that rate is 5.37, which yields 5.50 annual rate of interest.

I would like to preface my comments by saying that we have signed documents for the stipulations of settlement and two amendments to the stipulations of settlement. So, nothing that I say here is intended to alter any of the contents of the signed documents, including the business documents that support that promissory note and the other security items.

In addition to the $10 million plus the $30 million in promissory notes, the defendants and settlement class counsel have agreed to cooperate to obtain payment of any remaining funds held by the receiver to be paid into the settlement fund, but that will not in any way reduce the obligation to pay the $40 million, your Honor.

There were a lot of consideration that went into these lengthy negotiations.

THE COURT: Before you get into that, perhaps you could review for me the security for the $30 million in promissory notes.

MR. COOPER: Yes, I will turn to that immediately, your Honor.

For the $30 million, the initial note is a master [8325] promissory note for $30 million that will be held by the settlement administrator, which is an obligation of Defendant James Grosfeld, and it is secured by marketable securities that will be posted this morning by Mr. Grosfeld in the amount of $47,700,000 as a minimum, your Honor.

Appendix C

It's our understanding that will be posted in the form of Pulte Corporation stock. If there is any default in the obligations under the stipulations of settlement, the settlement administrator is authorized to liquidate that security to the extent necessary to pay down the promissory notes; and if there is a default, the promissory notes will immediately become due and payable, to be paid out of that source.

The stipulations of settlement provides that within 30 days of the day of preliminary approval, an irrevocable letter of credit on the National Bank of Detroit will be issued to secure the $30 million obligation, which is first the $30 million obligation on the master promissory note, but as the claims procedure — which I will explain — is carried through to identify the authorized amount for the various class members, then the promissory notes will be issued to the individual class members which will bear the same rates and terms as the master promissory note, which is the interest rate that I referred to above.

Those promissory notes are irrevocable and will [8326] receive the interest paid annually on December 15th. They will receive checks for that interest on December 15th of each year. With the payment of the fourth interest payment, the class members will be notified that by giving notice no longer than a year and no less than 15 days prior to the anniversary, the fifth anniversary of the issuance of notes, they can ask for those notes to be paid on the fifth anniversary with the interest up to that date.

If the class members do not make that request, your Honor, the notes will renew at the same interest rates for

another five-year period and will be paid without further notice at the end of the next five-year period, for a total of ten years.

In the event that there is a default under the stipulations of settlement or under the promissory notes, the class members who are holding these notes will be able to draw on the letter of credit issued by the National Bank of Detroit. That letter of credit will be in the form of continuing one-year letters of credit that must be renewed 60 days prior to the time that they are to expire.

If they are not renewed within that period of time, then the notes will become due and payable and the class members can draw on the letter of credit during that period of time to receive payment on the promissory note.

So, we believe, your Honor, that that is ample [8327] security for these promissory notes. These are, in effect, as we have discussed earlier, certificates of deposit that bear rates, interest rates, at the same rate as a certificate of deposit of the National Bank of Detroit.

The claims procedure process is that notice which has been approved and included in the settlement package will be mailed to the class members. They will be given 60 days from the date of mailing in order to file their claim. The claim form is included in the package of materials and has been agreed to.

The claim form provides that the information to be inserted in the claim form will be taken from the monthly

statements of the class members, the claimants, from MultiVest, Incorporated, or IPMC. If the class members do not have their monthly statements, they can either call the settlement administrator on the 800 number which is set forth on the claim form or they can write to the claim administrator and receive copies of their monthly statements.

If a class member requests the assistance of having his monthly statements copied and sent to him, there will be a $50 charge for the administration service.

The settlement administrator will review the claim forms as submitted to confirm that the information conforms to the information that is contained in the monthly statements. If the claim form is erroneous but can be conformed and can be [8328] corrected to reflect the correct information that's contained in the monthly statements, the settlement administrator will make those corrections.

The settlement administrator will not reject any claim form that is capable of being corrected to conform to the information that's set forth in the monthly statements. In the event that the settlement administrator concludes that the information set forth in the claim form does not conform to the requirements of the claim form, then the settlement administrator will notify the class member and provide the class member with a statement as to why the settlement administrator believes that the claim does not conform and will provide the claimant 20 days in which to respond and correct it.

In the event it is not corrected within that period of time, then it can become a disputed claim and can be presented to

the Court in the settlement administrator's report to the Court. So, there will be then an opportunity for the Court to review any of those claims in the event that there are disputes over that.

I should clarify, your Honor, that the $50 charge for obtaining monthly statements will be deducted from the class members' recovery. It will not be a charge in addition to the class member. There will not be a charge, a specific charge, to the class member. It will merely be a deduction from what [8329] the class member recovers.

Your Honor, there were a lot of considerations, a lot of analysis that went into our evaluation of this settlement and into our recommendation, as settlement class counsel, to recommend to your Honor that you approve the settlement on behalf of the class.

One of those considerations is the fact that this is an action against, in effect, an individual: Mr. James Grosfeld. Mr. Grosfeld testified under oath in this court that his net worth is approximately $100 million. Since that time, your Honor, he has filed, pursuant to your Honor's request, a financial statement stating that his total net worth is approximately $101 million. That was one of the events that has occurred in communication with your Honor since Monday.

This settlement of $40 million is a significant portion of that total net worth of Mr. Grosfeld. That was a consideration here. There is no insurance, as we understand it, for these claims. The sole source of recovery for any judgment would

be Mr. Grosfeld's assets. The personal net worth of Mr. Grosfeld of approximately $101 million was a consideration, given the fact that the total claims in this matter were $119 million, with a possibility of trebling a portion of those damages, plus prejudgment interest, which could have been an enormous amount of money.

We took into consideration the source of recovery [8330] from the potential sources of recovery of any judgment taken in this matter. Your Honor, the amount of the recovery here, $40 million, is approximately one-third of the total damages presented in court of $119 million. We believe that after the deduction of attorneys' fees, expenses and administration expenses that the payment to the claimants will be approximately 20 percent of their out-of-pocket losses.

Your Honor, we have studied and we tendered to your Honor the NERA Report, and we would like to make that a part of the record in this matter. It is a study of recoveries in class actions in the United States.

The 1996 NERA Report — and I'm speaking from memory now — shows some recoveries, and the average and the median recovery is in the range of approximately 9 to 10 percent of the total losses.

This settlement, your Honor, is a third — a third — of the out-of-pocket losses and 20 percent recovery to the class of their out-of-pocket losses after deduction of the attorneys' fees, which we will request, and have requested, of one-third of the recovery plus expenses.

I will address that in a minute.

This is a very significant recovery, your Honor, we believe, considering the source of funds to pay a judgment. This is a very significant recovery, your Honor, considering other class actions that are settled in the United States.

[8331] I would like to review a few things.

When this matter was first presented on Monday, it was discussed on the record by Mr. Goteiner and Mr. Anderson. Since that time, Mr. Dodyk and I arrived in Miami and met with you on Tuesday. We spent a substantial amount of time reviewing this with your Honor off the record in chambers; and as a result of our discussions with your Honor and responding to many of the concerns that you had, you will see that there are two amendments to the stipulations of settlement, one of which addressed the first round of concerns that your Honor addressed to us, and the second, which was executed yesterday, addresses a second round of concerns that your Honor had.

I have executed those amendments on behalf of the settlement class, and I will represent to your Honor that Mr. Lipoff and the Zuckerman firm have authorized me to inform you that we will provide you with executed signature pages on their behalf shortly.

One of the concerns that your Honor had related to the collateral and the security. In response to that, the arrangement was made to provide for the marketable securities in the form of common stock to be 150 percent of the outstanding debt of $30 million plus interest thereon. That has been done, and your Honor will see when we speak

with the settlement administrator this morning that he will confirm the amount of money or amount of stock that is being transferred to [8332] secure this, which reflects your Honor's concerns.

Your Honor was also concerned about the period of time when the letter of credit would come into place. Initially, what we had negotiated was for the letter of credit to come into place 120 days after preliminary approval, and in response to concerns of your Honor, we have agreed with defendants that the letter of credit would be put into place 30 days of the preliminary approval.

An additional item, your Honor, is that plaintiffs' settlement counsel and plaintiffs' counsel of record have waived their right to appeal. Timing and the form of our fees, as opposed to the amount, we are granting your Honor. Obviously we are waiving our appeal and leaving that flexibility in your Honor's very good hands, we believe.

Your Honor was concerned about additional elements that related to the finality of the settlement. You will see those are, likewise, reflected in the amendment documents that are Amendments 1 and 2 to the settlement agreement.

Your Honor addressed several issues where you were concerned about insolvency and potential bankruptcy as that might affect the quality of the security, and those concerns are also reflected in the amendment to the stipulations.

THE COURT: Perhaps either you or Mr. Newman could just review, very briefly, how you saw the potential insolvency issue with respect to the letter of credit.

Appendix C

[8333] MR. COOPER: I will call on Mr. Newman to do that, your Honor.

THE COURT: Okay.

MR. NEWMAN: My name is Jeff Newman.

Your Honor, we did, in both negotiating the settlement and also in following up on concerns raised by your Honor, look at issues related to the letter of credit and the potential for insolvency on that. We concluded as follows: One, we obtained, through the assistance of your Honor, representations from Mr. Grosfeld, not only as to his net worth, but also to the effect that he has no outstanding other obligations other than potential tax liabilities, and, therefore, we concluded that there was very little risk of insolvency.

Moreover, we concluded that once the preference period had elapsed and we had our initial security in place, and notwithstanding whatever collateral was posted, that would not constitute any kind of voidable transfer and, therefore, we felt on behalf of the class that they would be adequately protected against these insolvency risks, and we thank your Honor for being so concerned about it.

THE COURT: Thank you.

MR. NEWMAN: Maybe I could add one more thing. We understand that notwithstanding what Mr. Cooper said about the minimum amount of collateral, that we will find actually that [8334] Mr. Grosfeld has actually pledged 1,700,000 shares of Pulte stock, which we will find the value

of today, but is considerably in excess of 47,700,000, which he agreed to provide. So there is quite adequate collateral that has been posted in the interim.

MR. COOPER: Your Honor, just a couple of additional items I would like to draw to your Honor's attention with regard to the settlement. One relates to the claim form. We believe that the fact that the class members can pick up the phone and make a toll-free 800 call to the settlement administrator to answer their questions and to obtain assistance and to obtain monthly statements is a tremendous benefit in terms of resolving this.

Your Honor expressed interest and reviewed the claim form in chambers when we reviewed this, and we all agreed that the 800 number would provide some benefits to the class members. Also, I drew to your Honor's attention in chambers, and I believe we would like to place on the record, the fact that the agreements, the stipulations, provide that exchange-traded option positions that were opened at the end of the class period, which was October 31, 1989, the value of those positions still open on that date will be deducted from the claimant's claim in the settlement.

Now, I draw that to your Honor's attention because that is different than an order that your Honor has entered in [8335] the trial, but for settlement purposes, the defendants and the plaintiffs and the class counsel have agreed to that, and I just wanted to underscore that on the record.

Sections 2 and 3 of the claim form are where this information is set out. Section 1 is just basically where you

get the information, name and address, et cetera. Section 2 is a cash-in/cash-out calculation. What did you pay into MOI or IPMC and what did you get back, and then the difference is totaled out in Section 2.

In section 3, open positions at the end of the class period, and transfers out, value transferred out, will be addressed and then that is totaled.

Your Honor, the last item is, we have agreed to some dates with regard to this procedure, that is that the settlement administrator has indicated to us — and has assured us, indeed — that he will be able to mail out all of the class notices within two weeks, and that's two weeks from today, which is February 14th, and we have agreed that objections to the settlement and the objections to our fee request of one-third of the settlement, plus expenses, will be filed 30 days from the mailing date, which we are assuming to be February 14th, which will be March 17th.

We have requested your Honor to set a hearing 45 days from the February 14th assumed mailing date, of March 31st, and the deadline for having the claims postmarked will be 60 days [8336] after mailing, which will be April 30th; and, your Honor, we are going to try to mail that out as soon as possible, but we need a date. So we have assumed the April 14th.

With regard to attorneys' fees, your Honor, I have already addressed the fact that we have filed this morning a waiver of right to appeal with regard to the form of the attorneys' fees, but I should also state on the record that we

will request that your Honor award us attorneys' fees in the cash portion of the settlement so that we would be paid in cash to the extent possible. However, we believe that any award of attorneys' fees will contain a significant portion of an obligation by the settlement administrator to us. So, we will share, under any circumstances, we believe, very substantially with the class in the time-extended payment that I've already described to your Honor.

If your Honor has any questions, I would be happy to respond to those.

THE COURT: Well, first, let me turn to Mr. Dodyk and the other defense counsel and see if there is anything in particular that they wish to add.

MR. DODYK: Your Honor, I think Mr. Cooper has accurately described the settlement procedures. We have nothing to add except for the fact that I believe that under the stipulations, the proof of claims were to be filed within 60 days after the mailing, which is, by my calculation, April [8337] 14th.

THE COURT: I believe it's — well, we can look. I thought it was 45 days of mailing. In fact, we had discussed that specifically in chambers.

MR. COOPER: My calculation was it was 45 days for the hearing.

THE COURT: You are right.

MR. COOPER: Then 60 days from the mailing for —

THE COURT: Let's go back and look. Which exhibit is that?

MR. DODYK: Your Honor, I think the relevant entry shows date blanks, but we had agreed to a 60-day period between mailing and the submission of the claims. So I think that works out to April 14th, if I'm not mistaken.

THE COURT: Right.

MR. COOPER: Yes, your Honor, my calendar tells me that April 14th is the 45th day of the year. So, 60 days to there would be the 105th day, which my calendar tells me is April 15th.

THE COURT: The mailing of the notice, it is agreed upon it will be in two weeks, is that right, but the notice will be mailed by February 14th?

MR. DODYK: Yes, your Honor.

THE COURT: The objections will be filed in 30 days after the mailing of the notice, which is March 17th; is that [8338] right?

MR. COOPER: Yes.

THE COURT: The postmark date of the cutoff of claims will be?

MR. DODYK: I think we now have narrowed it down to April 15.

THE COURT: April 15.

MR. COOPER: Yes, your Honor.

THE COURT: And the hearing for approval?

MR. DODYK: We had requested for March 31.

THE COURT: March 31.

MR. DODYK: Yes, your Honor.

THE COURT: Okay. Anything else you want to talk about, Mr. Dodyk?

MR. DODYK: No, your Honor.

THE COURT: Mr. Cooper, you didn't talk about this. Maybe Mr. Goteiner would like to speak to this, but I do think this is a relevant consideration that we all ought to get out on the table, which is what this litigation would look like if it were to continue and how that fit into the settlement.

MR. GOTEINER: Well, I think defendants would make a representation as to what would happen under certain scenarios. I can assure your Honor, we are plaintiffs to win a jury verdict for the full amount of the losses. There would be a host of appellate issues that defendants would be taking up [8339] to the Eleventh Circuit, and if they could, to the United States Supreme Court.

THE COURT: In fact, I had committed to the defendants that before we went any further in this proceeding and before judgment was entered and before the bifurcated issues were resolved and provided there was a verdict for the plaintiffs and Mr. Grosfeld gave me assurances as to not transferring his assets, I would permit an appeal to the Eleventh Circuit because of all of the novel issues in the case.

MR. GOTEINER: I wasn't trying to speak for the Court, but the Court has indeed told us that in writing, something quite close to that, previously. So, we could have expected at least a full, from my recollection, two years just to resolve many of these issues, and then, of course, the interesting questions as to what would be happening under the CEA claim, depending what happened to the boiler room claim, and that would have led the Court to consider and decide upon a whole litany of novel ideas of how you deal with a case like this where you have to rebut the reliance presumption, and there's been much discussion in this case about the Knapp case being one procedure.

The Court never decided one way or the other whether it was going to adopt that procedure.

I should also point out by way of background, looming [8340] over this entire case has been the novelty that the Court has mentioned. Mr. Kaminsky, on behalf of defendants, has pointed out to the Court the changing law in this area, and I'm sure he could cite chapter and versus Third Circuit cases and various other cases that have come down on certification issues.

I should also say there is a sharp distinction in this case, a fraud-in-the-market case, by contrast, to a class certification, which are a cakewalk. So, there was a host of these issues that the Court has been struggling with for some years, and the Eleventh Circuit would still be struggling with.

So, in consideration of all of those issues and the promise of a lengthy appellate process, from plaintiffs' point of view, at least, this was a terrific arrangement, and given what Mr. Cooper has already said on the record, getting back for this class that has an average of $6000 loss per class member 20 percent, were the Court to grant the administration fees and costs that plaintiffs requested, and I think that covers the essentials of plaintiffs' view on what the future would hold for this case as opposed to the certainty that would occur were the case resolved now.

THE COURT: Okay. Well, unless there is anything you want to add on that subject, Mr. Kaminsky, or Mr. Bonner . . .

MR. BONNER: No.

THE COURT: Let me make a few comments. As we all [8341] know, we came in here Monday morning — I came in here Monday morning thinking we were going to have closing arguments. I got in very early to make a few little changes to the jury instructions. The phone was ringing off the hook. I didn't want to take the time to answer it.

Finally, one of my law clerks got in about 8:30 and answered it, and it was Mr. Goteiner on the phone saying

the parties have reached a settlement. My law clerk can speak to the fact that I threw my pen down on my desk and I was enraged.

After five months of trial, to think that it would be so easy to settle a case like this was a little disorienting for me, but of course everyone did recognize that settling a 23(b) class action is not a simple matter, and it requires notice to the class members, it requires a fairness hearing and it requires all kinds of proceedings that we needed to address.

Now, on Monday, court convened and litigation counsel attempted to outline for me what the terms and conditions of the settlement were; but unbeknownst to me, Cravath had stepped in for Mr. Grosfeld and had been negotiating, unbeknownst to me, with Mr. Copper, who I had never heard of until Monday, and it seemed as though what was going to be necessary was for the lawyers who had actually negotiated the settlement to fly in to meet with me and discuss it in more detail.

[8342] I made some comments on Monday after hearing what the terms of the stipulations were without having read it, which I now regret having had the opportunity to read it in detail and having had an opportunity to meet with the lawyers and to reflect on the agreement and hopefully to improve it somewhat. So, I apologize for my comments concerning cutting and running.

The other side of that is, the lawyers had something of a challenge in convincing me that the economics of the settlement were as good as they were representing them to

me to be, but both sides did a very good job of presenting me with their experience and the national experience in the resolution of class actions such that really I would be very hard-pressed to take the position this was not certainly within the range of reasonableness.

$40 million does represent a very substantial percentage of Mr. Grosfeld's net worth, and even if you want to look at it in terms of total losses with prejudgment interest, it still represents a very substantial percentage of recovery.

Of course, an aspect of the settlement involves the timing. The terms of the settlement at a very basic level involve the payment of $10 million in cash and with the $30 million payable over time. It would have been nice to be able to send the class members all of their money up front, but I think that the compromise that has been struck here is a [8343] practical and realistic solution, given the fact that what we are dealing with here is a situation where there is no insurance and we are dealing with an individual's net worth.

Now, because of the time aspect, though, I was, as Mr. Cooper said, extremely concerned about the security. We worked very hard all week to try and improve the agreement to tighten up that aspect of it in every respect, and I am satisfied that we have done as good a job of it as we can and that the risk to the class members is very minimal.

I know that the plaintiffs intend to seek their fees out of the cash portion of the settlement, but I have expressed to Mr. Cooper, and Mr. Cooper understands, that the attorneys

will have to share some of the risk with the class members, and in all likelihood, although I don't want to take an absolute position on this at this time, a very substantial portion of the attorneys' fees and costs will end up being deferred over the same period of time as the class members' payments will be deferred.

Now, of course, one of the very significant reasons why I am persuaded that the settlement is a good settlement, assuming that conditions that are contained in the agreement are complied with this morning, is that the securities are deposited and that the securities and cash have been deposited and the fact that this litigation would probably have gone on another three to four years, at least.

[8344] As I said earlier, the case raised a number of novel issues in a lot of ways. It was like trying to hammer a square peg into a round hole. Regardless of who would have prevailed in this particular proceedings, I believe that there would have been appeals. Those appeals would have taken to the Eleventh Circuit numerous novel issues.

I don't think I have ever seen a case that had so many novel issues in it, and it undoubtedly would have taken at least one, if not more, certified questions to the Florida Supreme Court. So, the lawyers would have had to litigate the appeal both in the Eleventh Circuit and in the Florida Supreme Court, and who knows how long that would have taken, especially on a record of this size. The record is very substantial after all this time in trial.

One of the reasons I didn't allow the 1292(b) appeal before was because I felt that in order for the Eleventh Circuit

to really understand this case, they needed a full factual development of what the plaintiffs' position was.

So, litigating an appeal on a record of this size is an extremely time-consuming exercise. I doubt very much there would have been a resolution of that appeal for 18 months to two years; and then if there had been a plaintiffs' recovery and that would be affirmed, we would had to go on and deal with this problem of the bifurcated issues, which undoubtedly would have ended up in another appeal.

[8345] So, I think we were looking at least to three or four years of more litigation, if not more, and with the outcome, at every step of the way, tremendously uncertain. So for all of those reasons, and provided that the securities and the cash are in place, I am prepared to give preliminary approval.

The only other thing — there is one other thing that I want to say, and that is that — and I'm not exactly sure how this fits in with the preliminary approval this morning, but I must say that I have never been exposed to a case, not in my practice and not as a judge, that was more contentious than this case. Not necessarily contentious in a nasty way, but there was not an issue in the case that was not contested.

It has been extremely time-consuming for everyone to litigate this case. So, at this point, unless there is something someone feels that I've left out that I haven't addressed, I think that what we ought to do is make the call to the — I guess it's to the settlement administrator, or is it to Cravath?

Appendix C

MR. DODYK: To Cravath, your Honor.

THE COURT: To make sure that the cash and the securities have been delivered.

MR. COOPER: I have one housekeeping matter.

THE COURT: Sure.

MR. COOPER: That is to confirm that we do have a hearing date on March 31st if that's available.

[8346] THE COURT: Let me get Catherine in here. How much time do we think we need to set aside? Should we set aside the whole day just in case?

MR. COOPER: I don't believe, and my experience would indicate, your Honor, that it would not take the whole day. I would believe the morning would be adequate.

THE COURT: We will set aside a half a day.

MR. COOPER: Also, your Honor, with regard to briefing on our attorneys' fees petition, how would you like us to do that and dates?

THE COURT: Let's see. First of all, March 31st is totally open. So, we will set this for the morning of March 31st for the hearing on the final approval of the settlement.

MR. COOPER: At?

THE COURT: At 9 o'clock. Actually, let's make it 9:30. How long do you believe it will take to put together your fee and cost petitions and the briefing that would go with it?

MR. GOTEINER: Three weeks, your Honor.

THE COURT: Three weeks. So, that would be, say, February 21st?

MR. GOTEINER: Yes, your Honor.

THE COURT: Is that okay?

MR. GOTEINER: Yes, your Honor.

THE COURT: Then I guess you all can respond, if you [8347] want to respond, within the time provided by the local rules, and hopefully we can avoid a reply because it will take us up pretty close to the hearing date, okay?

MR. GOTEINER: That's fine, your Honor.

MR. COOPER: Thank you, your Honor.

THE COURT: Okay. All right. Now, the arrangement is, I take it — maybe I should have paid a little more attention to this, Mr. Dodyk. The cash and the securities are being delivered to Cravath in escrow, to be delivered to the settlement administrator?

MR. DODYK: They are in the possession of Cravath at the present time, in the person of an associate by the name

of Scott Yut. The settlement administrator is in the office with him. I have given the clerk the telephone number.

THE COURT: Hello, Mr. Yut. This is Judge Ungaro-Benages in Miami. Can you hear me?

MR. YUT: Yes, I can.

THE COURT: Okay. We are all in open court, as is your voice.

MR. YUT: Okay.

THE COURT: Okay.

MR. YUT: I can hear you.

THE COURT: I am simply calling to confirm that you have delivered to the settlement administrator $10 million in cash, and you tell me how much in Pulte securities.

[8348] MR. YUT: I have delivered a million 555,000 shares of Pulte Corporation which, based on yesterday's closing price, is worth $50,762,500.

THE COURT: Could you say that again? You were kind of — your voice is breaking up a little bit on the speaker.

MR. YUT: All right. A million 555,000 shares of Pulte Corporation, which is currently valued at 50,762,500, and another 150,000 shares of Pulte Homes Corporation for which this morning we were unable to obtain an exact quote, but it's not widely traded.

THE COURT: Mr. Dodyk, are you able to repeat that back to see whether we got that correctly or not?

MR. DODYK: May I approach?

THE COURT: Please.

MR. DODYK: Scott, could you state as clearly as possible the value of the Pulte stock?

MR. YUT: 50,762,500.

THE COURT: Fine. Yes, Mr. Newman?

MR. NEWMAN: Mr. Yut, could you tell us the name on the stock certificates for the other stock certificates, please?

MR. YUT: Yes. Just a moment.

MR. BUCHBAND: This is Peter Buchband, your Honor.

THE COURT: Fine.

MR. BUCHBAND: The other company is identified as [8349] Pulte Homes Corporation, and if you like, I can give you the number that identifies the security.

MR. NEWMAN: My understanding from Mr. Ormsbee, who is at Cravath, is that actually the Pulte Homes Corporation is actually just the former name of Pulte

Corporation and, in fact, what you hold is really 1,700,000 shares of Pulte Corporation stock. From the certificates, you can't tell that, but I understand that's in fact what you hold.

MR. BUCHBAND: Okay, I was not aware of that.

MR. NEWMAN: That's okay.

MR. DODYK: Scott, what is the total number of shares that you have of the two companies?

MR. YUT: 1,700,000.

MR. DODYK: If you were to multiple that times the stock price for Pulte currently on the market, what is the total value?

MR. YUT: We will do that right now.

MR. DODYK: We are waiting for you.

MR. YUT: 55,675,000.

MR. DODYK: Thank you.

THE COURT: Okay. All right. Well, I am satisfied that the conditions that are contained in the agreement have been complied with.

Do you agree, Mr. Cooper and Mr. Newman?

MR. NEWMAN: We do, although I would like to have one [8350] thing confirmed.

Mr. Yut, you are prepared, as immediately as the Court has approved this order, to wire transfer to Garden City the $10 million you hold in your trust account; is that correct?

MR. YUT: That's correct.

MR. NEWMAN: And you will do so now?

MR. YUT: That's correct.

MR. NEWMAN: Thank you, very much.

THE COURT: Okay. Are we all set, Mr. Newman and Mr. Cooper?

MR. COOPER: We are.

MR. NEWMAN: We are.

THE COURT: Fine. Thank you very much, Mr. Yut.

MR. YUT: Thank you.

THE COURT: Okay. All right. Well, I am now going then to give preliminary approval to the settlement. I think the only order I have is the order that's in this book. Did someone have a loose order by any chance? Otherwise we will make a copy.

MR. COOPER: No, we don't, your Honor, but we believe the blanks in that order can be filled in now with the dates that your Honor has granted us.

THE COURT: Okay. Just a second.

MR. KAMINSKY: Your Honor, we will be happy to take [8351] one out for you.

THE COURT: Thank you very much. The first date appears on Page 9, and it says the Proof of Claims. This is the date for the proof of claims. So that should be April 15th, right?

MR. DODYK: Yes, your Honor. Page 12 I think is the next.

THE COURT: Right. At 9:30 a.m., on March 31st, will be the hearing for final approval.

MR. DODYK: Then Page 13, your Honor.

THE COURT: Right, is the cut-off date again.

MR. DODYK: Your Honor, that is the date for filing objections, and that is March 17, I believe.

THE COURT: Right. March 17th.

MR. DODYK: Then there is, of course, the date on the last page, which is today.

THE COURT: Right. Okay, and I am signing the order for preliminary approval at this time.

Okay, so that concludes this except for me to say that I appreciate very much the efforts that were made to resolve

the matter and very much the cooperation that I received this week in responding to my questions and dealing with my objections.

Yes, Mr. Goteiner.

MR. GOTEINER: Your Honor, I hate to have the last [8352] word, but on behalf of plaintiffs, I feel we must.

From the plaintiffs' side, and I think I speak for the defendants as well, we appreciate the incredible burden that this case over the years, as well as over the past six months, has put on the Court, the Court's staff, and it was a Herculean task for all concerned, but particularly for the Court. Far less people than we have, and we appreciate it.

THE COURT: You are welcome, but we all learned a lot. Thank you very much.

I feel compelled to point this out. Bill has given me a little crystal hourglass to sit up here forever and remind me of this case.

Okay. Now, do we have all of our jurors or not? We are missing two. Okay, well, I don't know that it's necessary, really — what do you all think? I don't know that it's necessary for you to be here when I discharge the jury. I am going to go and have a few words with them privately and personally to explain to them what has happened.

What's the consensus here? What's the feeling?

MR. GOTEINER: Your Honor, we have no objection at all to the Court doing that in any way the Court wishes.

MR. DODYK: For defendants, we have no objection.

THE COURT: You all are excused, and I will deal with the jury. They will probably become a little irritated, but I think I can live through that.

[8353] MR. GOTEINER: Your Honor, could you let the jury know, at least from plaintiffs' point of view, we would, if anyone wants to chat with us, talk with them, but obviously the Court would advise them they don't have to talk with any of us.

THE COURT: I'm going to let them know they are free to talk about the case if they want, and they are free to talk to the lawyers about it, and they are also free to keep to themselves.

MR. KAMINSKY: Your Honor, may we keep this to the lawyers rather than press and other people?

THE COURT: Yes. Although I can't order them.

MR. GOTEINER: We are asking the Court convey that the plaintiffs' attorneys would like very much to thank them.

THE COURT: I will thank them for all of you, okay?

MR. GOTEINER: And would like to speak with them as well. That's all.

THE COURT: Okay. Let me handle it.

MR. BONNER: Thank you, your Honor.

MR. GOTEINER: Thank you, your Honor.

THE COURT: If you will wait outside, we will get you conformed copies of the order. Thank you.

(Adjourned at 10:30 a.m.)

* * * *

APPENDIX D — EXCERPTS FROM TRANSCRIPT OF FAIRNESS HEARING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MARCH 31, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-Civ-UNGARO-BENAGES

WILLIAM WATERS and LINDA BARTHOLOMEW,

Plaintiffs,

– v –

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

Miami, Florida
March 31, 1997
9:45 a.m.

TRANSCRIPT OF FAIRNESS HEARING
BEFORE THE HONORABLE URSULA
UNGARO-BENAGES
U.S. DISTRICT JUDGE

* * *

[33] THE COURT: All right. So we'll go ahead and we'll proceed subject to the Court's review of that agreement.

Now, before we proceed further, I want to take a little time to review some of the relevant procedural history that's brought us to this juncture before we hear from the parties and the other individuals who are present who wish to be heard.

I gave preliminary approval to the settlement of the class action by my order dated January 31, 1997, and I want to note that that preliminary approval followed upon a week of intensive review and renegotiation of the terms of the proposed settlement between the Court, the parties' trial counsel and the parties' settlement counsel.

I also want to note that the proposed settlement as originally conceived was first presented to me on the morning of closing arguments after nearly five months of trial.

As I'm sure the attorneys for both sides recall, I wasn't very enthusiastic about the timing of their decision to resolve the case. After all, we had presumed upon the jury for many months and the jury was present and ready and willing to listen to the closing arguments and render a decision once and for all in the case as to whether or not there had been a scheme to defraud; whether or not MOI was a boiler room within the meaning of the law; and whether Mr. Grosfeld was responsible for it.

[34] I also was not very happy with the terms of the proposed settlement to the extent that trial counsel was able to outline those terms to me.

For example, I didn't like the idea that the class members would be compensated solely in the form of individual promissory notes that would not be payable any sooner than five years in the future, while most of the class counsel's fees and costs would be paid from the cash portion of the settlement fund.

I was also unhappy with the amount of security for the deferred obligation during the time preceding the delivery of the irrevocable letter of credit, and with the parties' apparent agreement at the time that a fee award of one-third of the $40 million settlement fund, which everyone at the time clearly understood to be approximately $13 million, was reasonable under the circumstances.

I distinctly recall, for example, the attorneys for both sides estimating that the net settlement fund which would be available for distribution to the class members after the fees and expenses were deducted and the administration expenses were deducted would be in the neighborhood of $24 million.

Now, as I have already noted, several days of discussions followed to deal with my concerns. During that time period the jury was not discharged because I was at all times prepared to go to verdict if a satisfactory agreement [35] could not be reached. However, by the end of that week sufficient changes had been made to the agreements to allay most of my concerns.

Additionally, the parties assured me that the terms of the agreement were sufficiently flexible to permit the deferral

of the attorneys fee and expense obligations in whatever amount I deemed appropriate.

As further assurance that I would be free to defer all or a portion of the fee and expense award, class counsel agreed to waive their right to appeal those aspects of the fee and expense award relating to the timing or method of payment.

I want to emphasize that in these discussions both sides went to some lengths to convince me that a settlement fund consisting of $40 million, albeit comprised of $10 million in cash and the balance in notes, less a fee award of one-third of the gross amount of the settlement fund and reimbursement of counsel's expenses, would produce an exceptional benefit to the class members.

Now, I'm not taking a position right now on whether or not I think it was an exceptional benefit or not, but that was certainly the position taken by both sides during that week of discussions.

These efforts on both sides to persuade me at least preliminarily of the significance of the result obtained in the case if the settlement were approved included comparative [36] analyses of settlements in other class actions alleging improprieties in the offer and sale of securities and other matters alleging fraud in the marketing of investments, and I directed that those analyses be placed in the court file and otherwise made a part of the public record, and I invite any interested person to review those documents which were supplied by both Mr. Dodyk for the defense and by class counsel.

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Having received, reviewed and considered these materials and having engaged in extensive discussions with the parties concerning the terms of the proposed settlement, and in the end having been persuaded by both sides that there was nothing in the proposed settlement that was outside the range of reasonable and adequate, but reserving to myself the ultimate decision as to the fairness of the settlement and the amount of fees and expenses to be awarded to class counsel, I gave preliminary approval to the settlement by the order dated January 31, 1997.

On February 21st, 1997, following entry of the order, the settlement administrator, the Garden City Group, apparently mailed the court-approved form of notice to all class members who could be identified or, more specifically, 20,591 individuals at their addresses as then known to class counsel and as updated by the Postal Service's national change of address database reflecting all changes of address submitted in the last three years.

[37] In addition, the settlement administrator has reported to the Court that the Court-approved summary notice was published in the New York Times, the Wall Street Journal and USA Today.

I acknowledge that the settlement administrator has reported that approximately 7,000 of the claim packets, which included notice of today's hearing, were returned as undeliverable. That is, of course, not surprising in light of the fact that this litigation has been ongoing for some six years and the average individual claim in the case is between $6,000 and $7,000.

In any event, the Court is satisfied that the notice given, including the notices published in the newspapers of national circulation, was the most reasonable and practical under the circumstances and was also customary in the administration of class action settlements.

I also note, however, that efforts are, according to the settlement administrator, ongoing to mail claim packets to the class members whose packets were returned as undeliverable.

That came about not because of the efforts initiated — not because of efforts initiated by the settlement administrator, as I understand it, but because pursuant to the request of class counsel the Court ended up ordering the settlement administrator to contract with another vendor to obtain updated addresses.

[38] Since then the settlement administrator has advised the Court that that vendor has supplied 4,743 updated addresses to which claim packets were recently mailed, and that additional updated addresses are expected shortly.

Now, having found that the best notice that was reasonable, practical and customary in the circumstances has been given, this matter is now ripe for final approval of the settlement and the other matters that I outlined at the commencement of this hearing.

To set the stage for how I wish this hearing to be conducted, I next wish to review the terms of the notice which govern the participation of class members at this hearing.

Appendix D

The notice specifically required that any class member opposing the settlement, including class counsel's request for fees and expenses, to have notified the Court and the parties of his or her opposition by March 17th, 1997 by, first, filing with the clerk of the Court a notice of such person's intention to appear together with a statement indicating the basis for his or her opposition along with any supporting documentation; and, second, by serving copies of such notice, statement, documentation and related papers or briefs upon plaintiffs' settlement counsel and defendants' counsel, Martin Kaminsky.

Now, until this morning I was aware of only one communication which had been received in response to the notice [39] which stated any opposition to the proposed settlement, and that communication was in the form of a pleading submitted by Carol Orkin, who I understand is present here in court.

Maybe Ms. Orkin can stand so I know who she is. You're Ms. Orkin. Okay. Fine. Thank you. You can have a seat.

Now, Ms. Orkin set forth several — well, three grounds on which she was objecting to the terms of the settlement. I don't know that she's objecting to the settlement in its entirety, but she was objecting to certain terms of the settlement, and she, true to her word, is here today to make her feelings known, and at an appropriate time I'm going call on Ms. Orkin to come forward so that she can state what her position is with respect to the settlement.

Now, this morning it was brought to my attention that there is present here in court an individual named Christopher Madden. Where is Mr. Madden?

(Raises hand).

Okay. And Mr. Madden contends that on March — I guess — he provided me with certain documents and I think copies have been provided to counsel. The letter states that he provided to me that's directed to the clerk of the Court: "I plan to attend the settlement hearing on March 31 to learn more about my standing in the class action suit against MultiVest to verify that I have been given proper priority [40] within the class and find out more details about the class, the distribution and the plan of allocation. I plan to present evidence of a previous settlement signed by the vice president of MultiVest Options." And he enclosed a release that he had executed as a result of a reparations proceeding, I take it, that he was involved in with MultiVest Options.

Now, what is the position of the — I must tell you, Mr. Madden, that I suspect that you are — I did not have a chance to really get into this because I only received this this morning, for some reason. But in looking at your release, I suspect that you are excluded from the class.

But, what is the plaintiffs' position on this?

MR. GOTEINER: Your Honor, we'd have to go back to the ruling. But I do provisionally believe that the language in the release may mean he's excluded. I think this is the magistrate's — the Special Master's ruling, which was affirmed, but I'm not sure.

MR. NEWMAN: Your Honor, if I might speak. I don't know that we actually represent Mr. Madden, but Mr. Madden told me he never received the $1,900 referred to in his letter. So it may or may not be that he was released. We just don't know the facts.

THE COURT: Okay. So, what is the plaintiffs' position on whether or not — well, let me ask Mr. Madden.

Mr. Madden, do you wish to be heard today or are you [41] simply hear to listen and to find out?

MR. MADDEN: Well, I'd like to be heard, but I'm not sure what I'm going to say.

THE COURT: Okay. Well, that's fine. Have a seat.

Well, what do you all think? Should we at an appropriate time let Mr. Madden speak or not?

MR. GOTEINER: Why not, Your Honor?

THE COURT: And what do the defendants say?

MR. DODYK: Your Honor, I don't have any objection to that.

It occurs to me that this may be a nonclass problem in that it sounds like Mr. Madden has an unsatisfied claim against the receiver for $1,900, which is outside the class. But the receiver may have a view on that.

THE COURT: Okay. So maybe we need for the receiver to — when the receiver returns, we'll revisit Mr. Madden's situation.

Okay. Now, the only other communication apparently which the attorneys received that was not in the nature of an opposition but more in the nature of an inquiry, which was from Mr. and Mr. Dorsey in Chicago, Illinois, who I take it are not here. Are the Dorseys here? The Dorseys are not present.

And they apparently had an account with MOI that straddled the end of the class period, and inquired whether they could recover for money lost in transactions after [42] 10-31-89.

So, although the Dorseys aren't here, I would hope that class counsel would explain during their presentation the rationale for the exclusions of the transactions subsequent to 10-31-89.

Now, let me also note before we proceed further that class counsel have now submitted their fee and expense petitions. Counsel is requesting one-third of the settlement fund as their fee and also $2,665,000 in expenses.

Now, I do want to note that the settlement's stipulation that the — excuse me, that the fee request of one-third of the settlement fund is the maximum amount of fees that the parties agreed — the parties, that's both sides — agreed could be sought pursuant to the settlement stipulation that the Court approved at the end of January, after being assured by both

sides that a fee of one-third of the gross amount of the settlement fund would be well within the range of reasonable.

Moreover, as part of the stipulation — and it's also in the order giving preliminary approval to the settlement — defense counsel agreed not to oppose the fee and expense application so long as the application did not exceed a request for a one-third fee — that's one-third of the settlement fund — plus expenses.

Now, I also want to note that I am far from committed [43] to paying — to the payment of the fees and expenses with 25 percent in cash and 75 percent as a deferred obligation that the plaintiffs' counsel has more recently proposed.

My preliminary view, although, again, I want to hear from everyone today, is that the portion allocated to cash should be in a sum certain in order to avoid uncertainty concerning the amount and timing of the cash distribution, to avoid unnecessary administration expenses and to decrease the counts for conflict.

Now, as I think you all can see, I also am fairly intent on resolving the receivership issues today because I would like to have some understanding of the extent to which the contribution of the receivership to the settlement fund will have in covering the expenses of the administration of the settlement.

Now, let's turn to the main reason we're here today, which is to determine whether the proposed settlement is

fair, reasonable and adequate, and it seems to me that we should first hear from Ms. Orkin and then perhaps we'll give Mr. Madden a chance to say whatever he wants, and then we'll let both sides say whatever they would like with respect to the settlement.

Yes.

MR. COOPER: Your Honor, my name is John Cooper.

I believe that there's one item I'd like to correct [44] for the record, and that is I thought that I heard the Court say that the notice was mailed on February 21st. I believe that it was mailed on February 14th.

MR. GOTEINER: That's correct, Your Honor.

THE COURT: Okay. Fine. Thank you.

Okay. So, Ms. Orkin, do you wish to come forward and say anything other than what's contained in your written objections?

MS. ORKIN: I do object to the original plan of allocation, although I do understand from my own experience with class action litigations that 20 percent is not an unreasonable sum to obtain back from a class action.

I would also like to see the filing deadline in this case extended because of the fact that so many of the addresses were outdated. This case is anywhere between eight and 11 years old as far as the addresses are concerned, and you've

had more than 7,000 returned, as you reported, and many of those people are only just now getting their claims. I don't think there's sufficient time for them to both request their monthly statements, get them back, then complete a claim form.

This is income tax time. People are filing their tax returns for April 15th. I do not think it would be unreasonable to extend the filing deadline and give people an additional opportunity to file claim forms.

THE COURT: Okay. Anything else?

[45] MS. ORKIN: It's just my contention. I would like to see as much of this settlement go to all of the members of the class and nothing back to the defendants.

I know that this is a reversionary settlement, but I would like to see as much of this money go to all of the plaintiffs.

Thank you.

THE COURT: Okay. Thanks.

And now, Mr. Madden, what do you want to tell us?

MR. MADDEN: I'll be very brief, and I don't have any objection to the settlement. I just don't know where I stand, if at all, in that settlement class.

Let's see. Brief background.

THE COURT: Sure.

MR. MADDEN: Ten years ago I opened an account with MultiVest, lost $3,000 due to what I believe was fraud and negligence, et cetera.

And a year before this class action was filed, I filed a notice that I intended to file an action against MultiVest, which I did do. I filed a complaint with the CFTC, and I was approached by MultiVest shortly after that via this letter, which you have a copy of, stating that they wish to settle for the amount of $1,900, which I agreed to and accepted and signed, and this letter and accompanying document was signed by officers of James McTevia and Associates on behalf of [46] MultiVest, and subsequently received nothing and was told after I called them that they would not be honoring their letter.

So, basically what I'm wondering is if —

THE COURT: Did they give you any explanation as to why they weren't going to honor the letter?

MR. MADDEN: No.

THE COURT: Okay. So, how did the release end up going back to the receiver? You signed the release and sent it back anticipating you would get the $1,900?

MR. MADDEN: That's right.

THE COURT: Is that what happened?

MR. MADDEN: They said after you return the signed originals of the enclosed documents to me — this is James Robash of McTevia and Associates — I will send you MultiVest Options' check in the amount of $1,900. After I send you the check, I will file the notice of satisfaction with the CFTC.

So I sent —

THE COURT: And, again, what did they tell you as to why they weren't sending you your $1900?

MR. MADDEN: This was so many years ago, I don't exactly remember. But I think they just basically said we're not going to honor the agreement.

THE COURT: As you see, the receiver is here today. So, I think when the receiver comes back into the room, at some appropriate time we'll try to take it up with the receiver and [47] try and understand what happened here.

MR. MADDEN: That will be good.

Obviously, I'm ignorant of all the legal complexities of all this, but I just learned from statements made a couple seconds ago that may or may not exclude me from the class. I don't know if that's good or bad for me. And I also knew nothing about this class action suit until a couple weeks ago when I read about it in the paper.

THE COURT: So you saw the notice in the paper.

MR. MADDEN: That's right. Actually it wasn't the notice. Since I live in Boynton Beach it was just a local news item because it's a company, or was.

Also, if I am in the class, if there's a hierarchy within the class and if this moves me higher or lower, close to the —

THE COURT: There are no priorities among the class members. Everybody's the same.

MR. MADDEN: Okay.

And basically, it would be really nice to know why something that I was able to accomplish, you know, seven years ago without paying lawyer's fees and all the other receiver's fees, now, if I do receive anything from this, I would have to pay all that, you know, additional monies on top of that; in other words, that comes out of the settlement, my part of the settlement.

[48] That's about all I have to say.

THE COURT: All right. Thank you.

MR. MADDEN: Thank you.

THE COURT: So who from the plaintiffs is going to speak concerning the fairness, adequacy and reasonableness of the settlement and perhaps address, hopefully address, Ms. Orkin's and Mr. Madden's concerns?

MR. GOTEINER: Your Honor, we have filed documents — Neil Goteiner on behalf of the plaintiffs.

We have filed pleadings, particularly the one on February 21, where we've set forth in some detail why we think the settlement is fair and reasonable, and I don't want to burden the Court with more discussion on that. It is a fair and reasonable settlement.

THE COURT: If you want to rest on your papers, that's okay with me.

Do you want to respond to some of the issues that Ms. Orkin raised?

MR. GOTEINER: Absolutely.

Well, Ms. Orkin raised, I think, three issues in her papers. One has to do with the reversion, and, of course, that was part and parcel of the settlement process and it enabled us to have a bigger settlement pot for those people who do come and claim. So — in fact, I've explained this to Ms. Orkin over the phone some time ago.

[49] So we think this was a fair and reasonable part of the settlement and made a lot of sense because it did create a bigger pot.

With respect to the $50 charge, which Ms. Orkin raised, that was going to be paying for the expenses that the receiver was going to undergo. There has been some issues, as you know, raised in the correspondence about that.

But the $50 was to come out of any award to a particular class member. It would not be paid up front. And at the time that was reasonable, it seemed to us. But there has been, as I say, some correspondence on this point which the Court might want to address after Mr. Buchband gets his letter on file.

The other objection that I recall Ms. Orkin made had to do with the fees. She didn't raise it orally, but, you know, the Court might want to discount a little bit what I have to say on this. We disagree with Ms. Orkin's written challenge to our fee. I did offer Ms. Orkin to send her the materials so she could make a more informed evaluation of that, and asked her not to — asked her to be gentle with us on this point. So, in any event, she declined to take a look at those documents.

THE COURT: Okay. What do you think about Ms. Orkin's comments concerning whether or not the bar date for filing claims should be pushed back?

[50] MR. GOTEINER: I was going to address that as well.

We agree. Obviously, plaintiffs think it should be pushed back. I should report to you that Mr. Buchband told me that when he was looking at the success rate, he was coming up with a 93 percent success rate on identifying these addresses.

Curiously, by pure serendipity, Ms. Orkin told us prior to the hearing that in fact she works with the Garden City Group and she has some knowledge of this as well, and they are doing a good job now of finding these addresses.

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The Court should also know on this score that Mr. Buchband further agreed that, to the extent these people aren't located, that he's going to go the next route, which is a $16, $15 charge, which is paid only if you get a hit, that is, only if you find the address.

So we think these people should get an additional time to file a claim.

THE COURT: How far back do you think the bar date should be pushed?

MR. GOTEINER: Well, it would seem fair to me that the people who are receiving the notices now should get the same amount of time to file their claims with the account statements as the rest of the class got.

THE COURT: Well, I think we need ultimately a cutoff date. I mean, I don't think it can be a fluid date. I think the date has to be fixed.

[51] MR. GOTEINER: Well, that's fine.

THE COURT: So, what do you suggest? May 15th?

MR. GOTEINER: Subject to Ms. Orkin agreeing, of course, May 15 would seem to be a fair enough date.

THE COURT: Okay. Anything else you want to say?

MR: GOTEINER: No.

THE COURT: Okay. Fine.

Okay. What do the defendants wish to say?

MR. DODYK: If Your Honor please, I only have one comment to make, and that is with respect to what Ms. Orkin states with respect to the current mailing.

And I would simply note for Your Honor that this is a problem which arises customarily in the administration of class actions, and the solution which is normally adopted by the courts is not to postpone the date by which the claims must be submitted, because typically, I think once the claims come in, then the parties simply stipulate that certain late claims, in occasions in which the late mailing is caused by some problem in the administrative process, such as, for example, in this case the decision to use the alternative source for the obtaining of the addresses, is accepted by both parties as a reason why with respect to those late-filed claims they will still be admitted.

So I would encourage Your Honor simply to see what happens, and I would be encouraged to think —

[52] THE COURT: Well, you know, in most cases I would be willing to do that. But in this case I'm not.

Is there an agreement that late-filed claims filed up through May 31st will be recognized?

MR. DODYK: Your Honor, I can't state that at this point. But I can certainly say that defendants would consent

to any mailing — any claim which came in late in which the lateness was due to some administrative problem, and I would hope that we would be able to resolve those without any further litigation. I can't —

THE COURT: Mr. Dodyk, I mean, really at this point I think you must understand that there is very little hope of resolving anything in this case without additional litigation.

MR. DODYK: I don't believe that's true, Your Honor. I really don't believe that's true.

THE COURT: I see. Well, what do you think that the impediments are to my just pushing the bar date back?

MR. DODYK: I'm not sure that's possible. I've never seen a case in which that's been done.

THE COURT: Okay.

MR. DODYK: And the bar date is a part of the stipulation; and while the Court has powers, obviously, procedurally over —

THE COURT: I'm not sure. I'm trying to recall whether the bar date was specifically part of the stipulation [53] or whether it was contained in the order.

MR. DODYK: The stipulation says that the bar date is 60 days after the mailing date, and then we put in the order April 15 because it was 60 days after the February 14th mailing date.

THE COURT: Well, actually I think that's sufficiently flexible to deal with the problem. Sixty days after the mailing date, whatever the mailing date might be.

MR. DODYK: Your Honor, that might be an appropriate solution with respect to this class of claimants. I'm not contesting that. All I Your Honor to do is, rather than attempting to resolve it in this fashion, why don't we what happens, because that's the way it normally works out.

THE COURT: Well, because seeing what happens in this case doesn't work out very well.

MR. DODYK: Well, Your Honor —

THE COURT: Okay. So, if your representation to me is that that's the language in the Settlement Agreement, then I think that that pretty well does it. Sixty days from the date of mailing.

MR. GOTEINER: Your Honor, I would just add to it that I think what would be appropriate is for Mr. Buchband — we'll get a new notice for those people who get late notices because they have to be told that, because right now it says April 15th. So those people — Mr. Buchband knows exactly who [54] those are; that there will have to be another notice sent to those people extending that date.

THE COURT: Well, okay. So you all are in favor of waiting and seeing what happens also.

MR. WISOFF: No, Your Honor.

Just to clarify it, the notices that Mr. Buchband is mailing out is the court-approved form of notice which has the April 15th date.

THE COURT: Right.

MR. WISOFF: We don't want people who have received this and it's after April 15th to refrain from filing because of that. So, what we suggest is that there be an amendment included in the remailed notices to let them know they have 60 days from the date of mailing, so that they won't be discouraged from filing a claim during that 60-day period.

THE COURT: So, what are you proposing? Let's be concrete here. Are you proposing that Mr. Buchband simply inclose some kind of brief statement?

MR. GOTEINER: Some of them have already been sent out, Your Honor. So, with respect to some that have already gone out, there's going to have to be a little one-page document that says the Court has extended your time to answer it until this date. All right.

And with respect to the ones that are going out now or haven't gone out yet, something can be included within that [55] notice that clarifies it.

THE COURT: Okay. Well, I see the defendants thumbing madly through the settlement stipulation trying to see what is provided.

MR. DODYK: Your Honor, the research isn't providing any change from what I stated originally. I again would

encourage the Court to think in terms of seeing what happens when it comes in. I understand Your Honor's view on that, but that would be my recommendation.

THE COURT: Okay. Well, let me just say this in the hope of avoiding further litigation on the point, which is that if the agreement provides 60 days from the date of mailing, then Mr. Buchband needs to keep records as to when the mailings are occurring. Let's start there.

If there is a need for Mr. Buchband to notify the people who received the notice late — as I understand it, there have been two mailings so far, is that right?

MR. GOTEINER: Your Honor, there could have been more than two. What's happening is I instructed — well, in fact, Mr. Dodyk didn't oppose it — I told Mr. Buchband to get those notices out as soon as he got the addresses.

THE COURT: Yes, but —

MR. GOTEINER: So there could have been a rolling —

THE COURT: — the affidavit I received from the Garden City Group on March 27th conveys to me that there have [56] been two mailings. At least that's the way I understand it.

MR. GOTEINER: I think he means, Your Honor — I can't speak for the man — but what he told me was that it is ongoing. As he gets the batch of the addresses back from

Mr. Miller at this credit bureau, he sends out additional notices.

We do know that the first mailing was on February 14th. That's what we do know.

THE COURT: And do you know when the second mailing was?

MR. GOTEINER: Ms. Orkin, I understand, can confirm for the Court that what I've told you is correct.

THE COURT: But Ms. Orkin, I take it, doesn't have the dates of the mailings.

MS. ORKIN: No, I don't have that on me. But it is on a rolling basis. As they come in, everything will go out.

THE COURT: Okay.

Well, it seems to me that as to the people who were not — whose packets were returned, if Mr. Buchband needs to send a notice explaining to people that they have 60 days from the date of mailing, then I think that that is certainly a reasonable thing for him to do so the people know that they have some additional time in which to make their claims.

And that's really, I think, all I have to say on it. I say it by way of guidance in the hopes that we can avoid [57] further litigation on this subject.

Yes, Mr. Newman.

MR. NEWMAN: Is the Court so ordering those so that we can represent that to Mr. Buchband?

THE COURT: Yes, I am ordering that.

MR. NEWMAN: Thank you.

THE COURT: Okay. Now, I would like to know — I would like some kind of report or something filed with me when the mailing has been concluded, so I know. Okay?

MR. GOTEINER: Yes, Your Honor. I think Mr. Buchband will submit that to the Court.

THE COURT: Okay. All right.

So, I did review what the plaintiffs provided with respect to their position on the fairness and adequacy and reasonableness of the proposed settlement. I am generally in agreement with their analysis of the situation. I do want to make a few additional observations or amplify some of the observations that the plaintiffs' lawyers have already made.

First of all, I believe that the plaintiffs have applied the correct legal analysis to the issue of whether or not the settlement is fair, adequate or reasonable by assessing the proposed settlement in terms of its relationship to investor losses, in relationship to the difficulties which were incurrent in the case, in relationship to the complexity, duration and expense of the litigation, in relation to the [58] substance and amount of the opposition to the settlement, in relationship

to the stage of the proceedings at which the settlement was achieved, and in relation to the plan of allocation.

Now, more specifically, with respect to each of those factors, I want to make the following observations:

In relationship to the amount of investor losses, the settlement fund consists of $10 million in cash plus approximately $185,000 to be transferred from the CFTC receivership and $30 million in the fully secured master promissory note. The master promissory notice bears interest at 5.5 percent a year and will mature in 10 years, but at the option of the holders of the individual promissory notes that will be issued to the class members with approved claims, the class members will be able, if they wish, to call their notes at the expiration of five years.

Notwithstanding that a significant portion of the class members' recovery will be deferred, I am convinced that the settlement represents a substantial recovery in the peculiar circumstances of this case and in comparison to other class actions alleging fraud in connection with investments such as securities. For reasons which may or may not be touched upon in the discussion today, I concede that securities fraud class actions are not the perfect analog to this case but, nonetheless, are the best comparators available for [59] assessing the reasonableness of the settlement in comparison to other cases.

To put the significance of the recovery in numerical terms, $40 million represents approximately one-third of the investor losses of approximately $120 million, and even

allowing for the delay in payment by factoring in prejudgment interest, the $40 million fund would represent about a 20 percent recovery.

The NERA study, which is in the court file and attached to the Senderowitz affidavit submitted by class counsel, analyze securities class action settlements from 1991 to mid-1996 and reach the conclusion that for that period the average settlement as a percentage of investor losses was 9.13 percent; that the median settlement as a percentage of investor losses was 5.89 percent.

Further, in cases where the settlement amount exceeded $10 million, as in this case, the average and median settlement value as a percentage of damages for that period was 11.1 percent and 6.6 percent respectively.

The defendants have previously indicated that they are generally in agreement with these conclusions, and Mr. Dodyk supplied the Court with his own informal list of results in class actions in which he or his firm had defended, and those results were not any — the results in those cases were certainly not any better than what was reflected in the [60] NERA study.

So, I do believe that the recovery in the case represents a substantial recovery in relationship to investor losses.

Now, in relationship to the difficulties that were inherent in the case, another factor, I think we could all go on at length about the difficulties involved in the case. Suffice it to say for these purposes that, as everyone has acknowledged, the

legal theories were novel, complex and difficult. In fact, the theories were so novel and posed such substantial questions of both fairness and public policy that I had agreed that in the event of a plaintiffs' verdict I would authorize the defendants to take an interlocutory appeal before proceeding with the case further, let alone to judgment, because there were additional proceedings that were necessary in order to determine whether the plaintiffs were entitled to anything at all even after this trial.

Because of the complexity and the novelty of the issues, and because the appeal would necessarily have required the Eleventh Circuit to certify a question to the Florida Supreme Court on an important issue of Florida law, I anticipated — and I think the plaintiffs agree with this — three to four years to conclude the appellate proceedings stemming from the trial and then possibly additional time, if the plaintiffs prevailed on appeal, and possibly another [61] appeal, to resolve the remaining issues in the case and enter a judgment.

The other aspect that I want to highlight — but, of course, this is by no means an exhaustive discussion of how difficult the case was — is that the defense was exceedingly well-funded. It was numerous, tenacious and contested every issue. During the four years when I presided over the case the defense, to my knowledge, was represented by several law firms, some of which are among the most prestigious in the country. To name only the ones of which I am aware — because I suspect there were even more — we have Cravath, Swaine & Moore; we have King & Spaulding out of Atlanta; we have Honigman Miller out of Detroit; Pollack & Kaminsky from New York; and the local firms of Valdes-Fauli, Greenberg Traurig, and Homer and Bonner.

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The defense was able to throw massive manpower into this case. I don't doubt that from time to time there may have been as many as 30 lawyers for the defense working on the case at any one point in time.

The defense lawyers were aggressive to the point that the plaintiffs frequently questioned their tactics, and both sides were so contentious and the issues in the case so massive that a Special Master had to be appointed to deal with the infinite number of issues that would arise on virtually a daily basis.

[62] It should also be noted that the case was made more difficult by reason of the fact that there was no insurance from which a recovery could be obtained. The sole source of any significant recovery was Mr. Grosfeld's net worth, and this made the case more personal, more contentious and more difficult to settle, as well as more uncertain of result because collection of a judgment became potentially a problem.

Now, in relationship to the complexity, duration and expense of the litigation, apart from what has already been said on this account in the papers that have been filed and what I have already said today, the large numbers of lawyers staffing the defense and their ability to generate controversy after controversy made any recovery uncertain, as well as did the unsettled state of the law.

Further, it should be noted that the case began in 1990 in federal court in California, and it was California counsel that accepted representation of Mr. Waters and Ms.

Bartholomew, and they accepted that representation on a contingent fee basis.

Then the case was transferred to Florida, and unlike what normally happens in securities fraud cases that are viable and well-founded, someone else comes forward with some other client and seeks the right to be lead counsel. Nothing like that happened here.

So, for over six years a relatively small group of [63] California lawyers had been battling a fairly large group of defense lawyers in a tenacious effort to bring this case to a conclusion in Miami, Florida. The logistical difficulties, not to speak of the expense and inconvenience, had to be extreme.

In relation to the substance and amount of opposition to the settlement, that factor is not — taking nothing away from Ms. Orkin, that factor doesn't have a lot of significance since out of even the 13,000 people who apparently have received the notice, she is the only person here objecting to the settlement, although her comments are, I think, well taken.

MS. ORKIN: I have no objection to them getting one-third of the settlement at this point.

THE COURT: Okay.

MS. ORKIN: I understand the complexity of it, and I think initially I was just angry at the reversionary clause and wanted to punish them for it. But I do understand that they've been working many, many years on this case and I have no objection to that. I know that one-third is the norm.

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THE COURT: Okay. Thanks, Ms. Orkin.

Did you get that, Bill?

THE REPORTER: Yes.

THE COURT: Okay.

Now, in relationship to the stage of the proceeding at which the settlement was achieved, as I understand it, the [64] settlement was arrived at after more than six years of pretrial discovery and other proceedings, five months of court proceedings consisting of the final pretrial conference and the trial, and not until after all of the evidence had been presented to the jury and the jury instructions and the form of verdict had finally been determined.

There certainly can be no question that both sides were fully aware of the strengths and weaknesses in their legal and factual positions and the toll being taken by the litigation generally, as well as what would be required to conclude the litigation when they agreed to the settlement.

In relationship to the plan of allocation, the stipulation of settlement provides that each class member will recover from the net settlement fund in the same proportion that his or her losses bore to total customer losses. Therefore, the claim of any class member will not reduce or increase the recovery of any other class member except to the extent that the Court orders that bonuses be paid to the class representatives, Mr. Waters and Ms. Bartholomew, which is a subject that we still need to discuss today.

And finally, I think it should be noted that the settlement plainly is not collusive in any respect. Both sides have represented that the settlement negotiations spanned several months and that a settlement was reached only after exhaustive review, rejection and reconsideration of numerous [65] earlier proposals. In fact, the contentious ugly quality of this litigation has continued to be apparent and a problem since the Court's preliminary approval of the settlement, notwithstanding that the settlement represents a joint proposal with the alleged support of both sides.

So, in sum, the Court finds that the settlement of $40 million on the terms set forth in the stipulation, even after having taken into consideration its most undesirable aspects, specifically the substantial deferral of compensation to the class members, strikes a fair, adequate and reasonable balance among the losses suffered by the class members, the length of time the class members have had to wait for any recovery, and the complexities and difficulties that have been inherent in and peculiar to this case.

So, the Court is approving the settlement as fair, adequate and reasonable.

Now, the next matter I would like to take up is the bonus issue as to Mr. Waters and Ms. Bartholomew. Class counsel are requesting $10,000 bonuses for each of the class representatives. Class counsel has represented that Mr. Waters and Ms. Bartholomew followed the litigation for nearly seven years and have pointed out that, unlike other class members, they were required to submit to lengthy depositions, to respond to additional discovery and to produce their personal financial records.

[66] Class counsel have also opined that the bonuses represent only a, quote, minor, unquote, portion of the settlement, but to my knowledge have not stated how any such bonus should be allocated between cash and a deferred obligation, or whether their position is that it should be paid entirely in cash.

So at this time the Court will hear the parties, beginning with class counsel, on the issue of the bonuses to the class representatives.

MR. GOTEINER: Your Honor, if we omitted to specify the allocation, it should have been in the same allocation as the rest of the class members, 25 percent cash, 75 percent deferred obligations, promissory notes rather.

THE COURT: Okay. And is there anybody who — do you want to say anything else in support of the request for bonuses?

MR. GOTEINER: Well, we have stated in our papers, Your Honor pointed it out — I would go into more, because there are a couple of class members here who might have certain feelings about it. It would really be to address their concerns.

But all I can say is that these people did follow — Ms. Bartholomew and Mr. Waters, did follow the litigation. It was a lot of emotional drain and strain on them, and in our opinion they are well entitled to it.

[67] THE COURT: Does the defense want to be heard on that issue?

MR. DODYK: The defense takes no position on the question, Your Honor.

THE COURT: I think that under the circumstances the $10,000 bonuses for each of them is reasonable, and that it should be allocated as follows: I think that they should receive $2,500 in cash out of the $10 million cash portion of the settlement and the balance as a deferred obligation.

Okay. So, I am trying to get away from this — I'm trying to make a point here, which is I'm trying to get away from this percentage allocation because I doubt very much that's the way I'm going to be going on the attorneys' fees today.

MR. GOTEINER: Your Honor, just to be clear. With respect to the Court's order on the class representatives, it's each, each of them gets the $25,000 plus $7,500.

THE COURT: Yes.

MR. GOTEINER: $2,500, I'm sorry, plus $7,500.

THE COURT: Yes.

Now, when the receiver was out of the room, a new issue arose with respect to the receiver. Maybe someone could take the receiver aside with Mr. Madden over here —

MR. NEWMAN: I'd be happy to step outside and do that for a second, explain to them what happened while they were out [68] and then they could come back in. Would that be helpful?

THE COURT: Yeah. I was going to go on now to the attorneys' fees issue. But maybe what I could do is take a five-minute recess before we do that, and that will give you a chance to talk to them about this other issue.

MR. NEWMAN: That would be very helpful. Let me just take them outside and talk to them.

THE COURT: Okay. Let's take a five-minute recess.

(Recessed at 11:30 a.m.)

(Resumed at 11:46 a.m.)

THE COURT: Okay. Let us resume here.

Did the receiver's counsel and the receiver have an opportunity to speak to Mr. Madden?

MR. TRAISON: We did, Your Honor. And we'll address two issues now, Mr. Madden's issue being one and then the issue originally posed by the Court regarding the storage cost so that you'll have the proper figures.

THE COURT: Right.

MR. TRAISON: What I'd like to do is simply lay out the facts as we've determined them.

It appears that sometime ago, I believe in or about 1990, the receiver was in the process of making settlements with some claimants and in fact did complete some of those settlements and actually also paid those claimants.

There were, however, three or four, perhaps as many [69] as six, with whom a proposed settlement had been made, but prior to the time that the Settlement Agreement could be completed — and certainly that would include the payment of money — the CFTC notified the receiver that it objected to any more settlements being made because it felt that there would be virtually dozens if not hundreds of these coming and the estate would be depleted roughly, soon.

The receiver determined that that was probably correct, but in any event, honoring the request of the CFTC, stopped the process of the settlements, and in the case of Mr. Madden, did not make that payment.

THE COURT: So the receiver's position would be that the release that Mr. Madden delivered was not delivered in exchange for any consideration and is void.

MR. TRAISON: I must say to the Court that my first reaction when I began to hear these facts was that possibly Mr. Madden had relied upon an agreement with the receiver to his detriment, thus compelling us to honor it because of his reliance; and, number two, because other parties similarly situated did not appear today to raise the issue.

But I must advise the Court that Mr. Madden has advised the receiver — and, of course, Mr. Madden did not have counsel here either, so that's a little awkward — that he did know that it would not be honored, the agreement. So that makes me question the reliance issue and —

[70] THE COURT: Well, no. My question to you is do you take the position that he executed a release or not?

MR. TRAISON: He executed a release.

THE COURT: But do you take the position that the release is valid, that it was given in exchange for any kind of consideration?

What did he receive for his release, Mr. Traison?

MR. TRAISON: He received nothing at all for his requite. Quite the opposite, he probably relied —

THE COURT: And he gave the release in anticipation that he would receive $1,900.

MR. TRAISON: That is correct.

THE COURT: So you don't take the position that the release is effective, do you?

MR. TRAISON: No, not that it's effective, no.

THE COURT: Okay.

MR. TRAISON: The question we were focused in on and would like the Court to make the decision on is whether the receiver would have permission to pay the $1,900 to Mr. Madden from the receivership.

THE COURT: Well, I don't know. It's sort of a — the fact is that Mr. Madden would benefit over and above the other members of the class if the Court were to agree to that.

It seems to me that Mr. Madden is a member of the class, and so he should assert his claim like the other class [71] members and receive his proportionate share of the recovery. I don't see that he relied to his detriment and I don't see that the release is valid.

Now, this raises an issue in my mind, because I would like to avoid litigation in the future to the extent possible, of other individuals who sent releases to the receiver who we may have believed were therefore not part of the class.

Now, as I recall, the only people that I ruled out of the class were the people that released MOI and its affiliated entities basically. I haven't gone back to look at that ruling in a long time, but I think that that's it. So, it's the people who had the kind of language in their release that Mr. Madden had that would be of concern to me.

Now, I don't recall that when we looked at who was in and who was out of the class, at least on a preliminary basis, I don't recall seeing any other releases that were executed by the receiver. Now, I don't know whether any of the defense lawyers who are present are in a position to speak to that, because I think this is more Mr. Wasinger's bailiwick.

MR. KAMINSKY: I'm afraid that's correct, Your Honor. We're not aware of that ourselves. We don't know what the situation was one way or the other.

THE COURT: Well, what I would ask the receiver to do is to supply me and the lawyers for both sides with a list of anybody — of the names and addresses of anyone and

supporting [72] documentation relating to any person who delivered a release who didn't get anything for the release. Okay?

MR. TRAISON: That should be fairly easy to do given the small number involved.

MR. McTEVIA: To the contrary, I don't think we'd be able to do that because the release —

MR. TRAISON: We're taking about four or five.

MR. McTEVIA: No, we're not. We're talking about — the release issues falls into three separate categories, your Honor. There were a number of checks that were written from the receivership estate for people who got the releases in.

This is an ongoing process. We're in the process of negotiating with them, and there were releases that were sent out and there were a number of releases that were returned to the receivership. And this happened so long ago, I don't know if I would be able to reconstruct the — that's the question I had in my mind out in the anteroom here talking to Mr. Madden.

How in the world am I ever going to be able to reconstruct who we sent releases to, who sent the releases back to us where they were in our possession?

THE COURT: Well, let me ask you this. Do you have a list of the people that you sent money to?

MR. McTEVIA: Yes. Of course, they would have been sent money out of the receivership account, that's correct. It would have been in 1990.

[73] THE COURT: How about this. How about you give us all a list of the customers who received money from the receiver?

MR. McTEVIA: Okay. I can do that. I can reconstruct that through the checkbook.

THE COURT: And then at least when people submit — if there are other people who come forward, like Mr. Madden, who claim that they had some kind of an agreement with the receiver that was not consummated, we can at least go to the list to see whether or not they received any money from the receiver, and then we can take it from there.

MR. McTEVIA: But for the sake of writing a check and putting it in the mail, that agreement with him would have been consummated, and my discussion with counsel and Mr. Madden out there was all of these other people, whoever they are, were all given notice of this, and Mr. Madden was the only one to show up with his release and says, wait a minute, I never got a check and you told me I wasn't going to get one but you never told me why. So, you know —

THE COURT: Do we even know to a certainty that Mr. Madden didn't get paid? I mean, Mr. Madden says he didn't get paid. Does that jibe with your records, do you know?

MR. McTEVIA: Well, when we get the list of the people who got paid, as Your Honor has suggested, we'll find out.

[74] THE COURT: Okay.

Well, my position is Mr. Madden's part of the class. Apparently that was the intent at the time. The intent at the time was that when the receiver stopped paying with respect to these disputes was that if people had claims, they were either going to have to assert them directly against the company or they were going to have to be part of the class, the company and the related parties, or be part of the class. Is that right?

MR. TRAISON: Yes. It was never our intention to assert that the release was effective.

THE COURT: Okay. Fine. What about this other issue concerning the —

MR. TRAISON: I'll ask the receiver to address that.

THE COURT: Mr. Madden, so what you need to do is you need to submit a claim, and if you -- I don't know. I doubt that anybody here has any claim forms. But you need to contact the Garden City Group and get the claim forms.

MR. MADDEN: I have the claim forms, your Honor.

THE COURT: You do have the claim forms.

MR. MADDEN: Let me just say, if I had been aware of the opportunity to exclude myself from the class a couple of years ago —

THE REPORTER: Excuse me. I'm not hearing you. You neat to get near a microphone, please.

[75] THE COURT: The court reporter needs to be able to take down everything that's said.

MR. MADDEN: If I was aware of the opportunity to exclude myself from the class, I think it was two or three years ago, I would have pursued that at least based on this. But I never knew anything about this action or the exclusion opportunity until long after that date passed.

THE COURT: Okay. I appreciate that. But I long ago determined that the notice that was given to the class members of the action was the most reasonable and practical under the circumstances, and the time has long expired to challenge that.

MR. MADDEN: Can I also say that I spent hundreds and hundreds of hours researching this and bringing this together, and that's what I think, based on the merits of what I had presented, the receiver agreed to pay that money, and I complied with what he — they asked me to do and never got anything in return for it.

THE COURT: Okay. I appreciate what you're saying, but at this point I don't see that there's really any — I think it would be highly inappropriate to treat you any differently than any other member of the class.

MR. MADDEN: I am sorry you feel that way, Your Honor.

THE COURT: Okay. What about this other issue concerning the costs?

[76] MR. McTEVIA: I've contacted my office and we made some telephone calls.

To transport all of the records from Miami back to the Fort Lauderdale storage area would cost approximately $7,000, which is approximately what the cost was to transfer them there in the first place.

To pay for the storage areas that are necessary to store all of the books and records in the Fort Lauderdale area for a period of 12 months would run $800 a month at Shurgard Storage for approximately $9,600.

To hire a shredder — and the shredding company would do it on the premises, Your Honor; there would be no more moving of the books and records; a shredder would come to wherever the books and records were and the documents would be shredded after a period of one year — would cost $15,000.

So, for approximately $5,000 more, these books and records can be maintained in estate for one year, after which they can be destroyed, and my office is prepared to coordinate all the efforts.

THE COURT: What about, I thought you were going to store them in Fort Lauderdale for 30 days in some other location?

MR. McTEVIA: The transport of the books and records to Shurgard allows for the books and records to be examined at Shurgard Storage.

[77] THE COURT: Fine. Okay. And, of course, we're only talking about a year as hopefully a very outside date. Hopefully they would be able to give you notice sooner than a year and save us that $5,000 or more.

MR. McTEVIA: We will control access to the facility for 30 days as you've recommended, but after that I suspect that any party in interest who wants access can simply contact us for a key and we can make arrangements.

THE COURT: Well, does anyone see a problem with that?

I'm really not very satisfied with that. My position is — actually this is my position. My position is anybody who wants to see the documents for the next 30 days can go look at the documents for the next 30 days. But after that 30 days those documents stay under lock and key.

MR. McTEVIA: I understand, Your Honor.

THE COURT: Okay. So the total — so, let me make sure — my arithmetic must be really lousy. It was $7,000 plus $9,600.

MR. McTEVIA: That's correct.

THE COURT: Plus $15,000, right?

MR. McTEVIA: That's correct.

THE COURT: So the total is $31,600?

MR. McTEVIA: That's correct.

THE COURT: As opposed to the $33,000 that Bekins — [78] no, they were $27,000.

MR. McTEVIA: $27,000, your Honor.

THE COURT: Okay. Fine. So I think that that's acceptable, with the understanding that if the parties can notify you that the appellate time has expired sooner than the expiration of a year, then at that point the documents should be destroyed.

MR. McTEVIA: And the remaining funds should be turned over to the disbursing officer.

THE COURT: Right. Exactly.

So, now, Mr. Traison, I'm hoping you're going to draw the order here on the receiver's fees and expenses and your attorneys' fees and expenses. Do you need for me to recap any of this?

MR. TRAISON: I don't think we need to trouble you with that now. Perhaps I'll have those pages from the transcript requested.

So I take it from your comment that that portion will be separate from the order directing how the receiver will

dispose of the documents, and we'll have two orders there, one for fees and expenses and one on the disposition issues.

THE COURT: That would be fine. I don't have a problem with that.

MR. TRAISON: Now, would the Court like us to prepare the disposition order as well —

[79] THE COURT: Yes.

MR. TRAISON: — with the release language, et cetera?

THE COURT: Yes.

MR. TRAISON: Thank you, Your Honor. We will do that.

THE COURT: And at what point — so, let's see. What you'll end up doing is you will end up turning over to — let's figure out how much you'll be turning over now to the settlement fund. Let's see. The receiver's fee, $38,000 minus $4,463.

MR. McTEVIA: I have it all figured out, your Honor.

THE COURT: Okay.

MR. McTEVIA: After deducting what was disallowed and allowing what I am petitioning for, the receiver's fees and expenses would be $37,080.22; and counsel for the receiver's fees, yours would be $10,000; and the Shurgard would be $31,600.

THE COURT: Okay. So the total is?

MR. McTEVIA: $45,380.22 is the deduction from $215,125, plus the receivables of $7,455 which I've received already this morning, and $3195 which I've yet to receive from plaintiff.

MR. TRAISON: Just for the record, I think the order will also need to contemplate the return by receiver's counsel [80] of the $1,440 that was disallowed to the receivership estate.

THE COURT: That's right.

MR. McTEVIA: So we have $225,775 in assets. How much are you going to return to the estate?

MR. McTEVIA: $1,440 is going to be returned. So the net asset is $227,105 minus $45,380.22.

THE COURT: Okay.

MR. TRAISON: Okay?

THE COURT: Okay. So, anyhow, you'll break this all down, hopefully, in the orders and we'll all have a chance to review them and make sure they're okay.

How soon will you be able to get the orders to me?

MR. TRAISON: Well, we should be able to send around drafts within a matter of days. I would feel comfortable if I

had those pages from the transcript. I don't know how long that will take to get that.

THE COURT: Bill, can you provide him with the transcripts, just the portions relating to the receivership, by Friday?

THE REPORTER: Yes.

THE COURT: So we'll look for your order by the following Friday, which is, I think, April 11th.

MR. McTEVIA: It looks like $181,724.78 is the amount that will be turned over to the disbursing officer.

[81] MR. TRAISON: We'll get all those figures and we'll circulate a draft.

THE COURT: So it's more or less $181,000.

MR. McTEVIA: That's correct, your Honor.

THE COURT: Thank you very much.

MR. TRAISON: Thank you, Your Honor.

THE COURT: Okay. Now, the next matter is the issue of the attorneys' fees and costs, and again, I want to take a couple of minutes to introduce the issue.

There have been at least two noteworthy developments since I gave my preliminary approval to the settlement with

respect to the issue of attorneys' fees and costs. First, the plaintiffs' counsel has since proposed that their fee and expense award be paid 25 percent out of the cash portion of the settlement fund and 75 percent as a deferred obligation to the settlement class, so that the class members might similarly receive 25 percent of their approved claims from the cash portion of the settlement and 75 percent in the form of individual promissory notes.

That proposal was directly responsive to the dissatisfaction that I had expressed during the last week in January when preliminary approval of the proposed settlement was under consideration, my initial reaction having been that the proposed settlement unfairly placed the inconvenience and uncertainty of the deferred obligation entirely on the members [82] of the class while the lawyers would receive an immediate benefit.

While I don't disagree that the plaintiffs' proposal is a step in the right direction, I'm not sure that the deferred portion of the fees and costs must necessarily be 75 percent as opposed to some lesser percentage or some lesser amount. After all, if they have conferred a substantial benefit on the class under exceptionally difficult circumstances, fairness would seem to dictate that they be differentiated from the passive class members by receiving an amount representing a higher percentage from the cash portion of the settlement fund.

The other noteworthy development is that, notwithstanding that the defendants agreed not to oppose the plaintiffs' fee and expense applications, the defendants'

lawyers have taken the position that the fee, to the extent it is a percentage of the fund, should be based on the actual amount of approved claims and that the determination of the fees and expenses should be deferred until the amount of the approved claims can be ascertained.

They further have estimated, based upon Mr. Dodyk's experience in one other class action, that the actual payout on approved claims, due mainly to the failure of class members to submit claims, would be as low as $3,600,000, and from this estimate they argue that the plaintiffs' counsel should be [83] limited to a fee of 33 percent or more or less this amount, which would represent a loss of, of course, many millions of dollars to the plaintiffs' lawyers.

This position poses a logistical problem for the defendants, apart from the fact that they agreed not to oppose the plaintiffs' attorneys' fees and expense applications; that is, they argued vigorously for preliminary approval of the settlement, and in the course of their arguments asserted that the settlement of $40 million, albeit in cash and notes, represented a substantial and unusually large recovery in a class action such as this. In so arguing, they took no issue at the time with the plaintiffs' lawyers' view that, depending upon whether delay was considered, the recovery represented between 20 percent and 30 percent of the investor losses in this case.

To deal with this problem, Mr. Dodyk notes in his submission that an actual payout of $3,600,000 would still represent about three percent of the claimed total loss of approximately $120 million, and he notes that because he

would like to see the plaintiffs' lawyers — apparently because he would like to see the plaintiffs' lawyers incur substantial losses and see the settlement go through.

Of course, regardless of whether such a settlement would be upheld on appeal, a proposition which I believe is doubtful but in which Mr. Dodyk has a lot of confidence, [84] apparently, I would not have given approval to the settlement if I had believed that its true economic value were only $3,600,000, not after five months of court proceedings and four prior years during which I was the presiding judge over litigation more contentious than I suspect most of my colleagues will ever be exposed to.

Moreover, Mr. Dodyk's "the glass is half full and empty at the same time" argument fails because, in my view, it is contrary to law, specifically Supreme Court precedent. In the Boeing Company versus Van Gemmert, at 100 Supreme Court 745, the Supreme Court held that the District Court had properly awarded attorneys' fees from the total amount of the class action judgment, including the unclaimed portion of the judgment, since each class member had present vested interest in the class recovery and could collect his or her share by submitting a claim, regardless of whether he or she actually did so.

In fact, Mr. Dodyk has provided the Court with no law to support his position that this Court should only look to the amount actually paid to determine plaintiffs' counsel's fees, despite the thousands of class actions which have been successfully concluded in this country. He simply proposes to distinguish the case now before the Court because the

settlement stipulation in this case provides for a reversion to Mr. Grosfeld of all unclaimed funds; whereas, according to [85] Mr. Dodyk, there usually is no difference between the amounts contributed to the settlement fund and the amount disbursed.

But Mr. Dodyk seems to forget that a reversion was part of the settlement in the Boeing case. Also, I do not accept that reversions are unusual because of the prescription in the law against fluid recoveries, i.e., recoveries which can vary up or down depending upon the number of claims asserted.

Finally, Mr. Dodyk's contention fails to account for the public interest that the well-conceived class action advances. If attorneys can only prosecute such cases at a loss, which will be the end result of Mr. Dodyk's approach, no attorney would be willing to undertake these difficult cases.

In short, Mr. Dodyk's position may have public relations appeal, but is entirely contrary to law and to public policy and the Court rejects it.

Turning now to what would be a reasonable fee and expense award in this case, the parties acknowledge that the Eleventh Circuit Court of Appeals decision in Camden One Condominium Association versus Dunkel, at 946 F.2d 768, Eleventh Circuit, 1991, supplies the appropriate method of calculating a fee in a case such as this.

Pursuant to Camden One, quote, "Henceforth in this circuit, attorneys' fees awarded from a common fund shall

be based upon a reasonable percentage of the fund established for the benefit of the class," close quote.

[86] In making this pronouncement, the Court of Appeals noted that analysis in a common fund case focuses not on the plaintiffs' position as prevailing parties but on a showing that the fund conferring a benefit on the class resulted from their efforts. In this context, monetary results achieved predominate over all other criteria.

The court went on to note that the majority of common fund fee awards fall between 20 percent to 30 percent of the fund and that, therefore, many district courts were using 25 percent as a benchmark to be adjusted up or down depending on the circumstances in a particular case.

Now, having said that, dealing only with attorneys' fees and not with costs, is there anything other than what is contained in your papers that you would like to say concerning the attorney's fee? Plaintiffs' counsel.

MR. GOTEINER: No, Your Honor.

THE COURT: And how about the defense?

MR. DODYK: We have nothing to add, Your Honor.

THE COURT: Fine. Then the Court makes the following findings:

The only evidence before the Court from which a benchmark might be selected, as required by Camden One,

is the NERA study of filings and settlements in shareholder class actions.

I would note again, as I did earlier, that securities [87] class actions may be the best comparators available for the purpose of assessing the fee in this case, but there are many dissimilarities between this case and the typical securities class action, making this case much more difficult.

In any event, the NERA study includes the following findings: That the average attorney's fee in securities class actions in the Eleventh Circuit between 1991 and mid-1996 was 29.92 percent of the total settlement, and that the average and median attorneys' fees awards as a percentage of settlement in class actions nationwide that were settled, class actions that were settled nationwide, in the range of $10 million to $49 million was 31.72 percent and 33.33 percent, respectively.

Since this Court sits in the Eleventh Circuit, I have decided to use a benchmark of 30 percent, or $12 million.

The next issue is whether the benchmark should be adjusted up or down based upon the particular factors present in this case. In making that decision the Court again looks to Camden, which instructs me to apply such factors as the factors in Johnson versus Georgia Highway Commission at 488 F.2d 714, Fifth Circuit, 1974, as well as other relevant factors, such as the amount of time required to reach a settlement, whether there are any substantial objections to the settlement or fees, and any nonmonetary benefits conferred upon the class by the settlement and the economics involved in prosecuting a class action.

[88] Applying the Johnson and related factors, the Court finds as follows:

As to the time and labor required: Plaintiffs' counsel has supplied the Court with a dearth of information concerning their actual time and labor required to prosecute the case. While I would have preferred more information and much more detail, I am sufficiently acquainted with this case as well as other class actions in this community, both as a practicing lawyer and as a judge, to know to a certainty that the time and labor required to prosecute this case far exceeded the average investor class action.

The abnormally high expenditure of time and labor is attributable mainly to two aspects of the case: The novelty and complexity of the issues and the vigorous and unusually aggressive defense. In fact, the demands on the Court's times and the demands which would have been made on the assigned Magistrate Judge were such that, as I noted earlier, it became necessary to appoint a Special Master to oversee the pretrial proceedings in this case. This factor, therefore, militates in favor of an upward adjustment to the benchmark.

With respect to the novelty and difficulty of the issues involved, virtually every issue in the case, from issues of federal preemption in the area of commodities regulation to the applicability of the presumption of reliance, was novel and difficult.

[89] In fact, the defendants took such exception to the Court's resolution of certain of the more difficult legal issues in the case that they took the unusual step of seeking a writ

of mandamus from the Court of Appeals to prevent the trial from proceeding.

Moreover, I was sufficiently uncomfortable with the applicability of the law to the facts in this case that I had made that I had agreed that the defendants could take an interlocutory appeal in the event of a plaintiffs' verdict, provided they could assure me that Mr. Grosfeld would not remove his assets beyond the Court's jurisdiction. This factor militates in favor of an upward adjustment to the benchmark.

The third factor is the skill requisite to perform the legal services properly. For the reasons I've already stated, the case required a higher degree of skill than the average securities class action. This factor militates in favor of an upward adjustment to the benchmark.

The fourth factor is the preclusion of other employment. I have no doubt that the Farella Braun attorneys who were actively and continuously involved in this case were unable to devote any significant time to any other matters, particularly during the five months that they were in Miami for the final pretrial conference and the trial. This factor militates in favor of an upward adjustment to the benchmark.

The customary fee is the fifth factor. The Court has [90] already noted that a customary fee in a securities class action, the type of action most comparable to this in which there is wide experience, would be approximately 30 percent. This factor is neutral with respect to the benchmark.

The sixth factor is whether the fee was fixed or contingent. Plaintiffs' counsel have not supplied me with

their engagement letter with their clients. However, attorneys Goteiner and Lipoff have sworn under oath that the fee arrangements with Mr. Waters and Ms. Bartholomew were contingent, and that the two law firms advanced the very considerable costs incurred. This factor militates in favor of adjusting the benchmark upward due to the substantial risks accepted by plaintiffs' lawyers.

The seventh factor is the time limitations imposed by the client or the circumstances. The clients imposed no time limitations. There were, however, emergencies from time to time that required quick response on the part of the attorneys. This factor is neutral with respect to the benchmark.

The eighth factor is the amount involved and the results obtained. The Court has already explained that the out-of-pocket losses were approximately $120 million. Those losses were fixed in or around 1989, so there has been a significant delay in obtaining compensation for the class. If the delay were taken into account, the out-of-pocket losses [91] including prejudgment interest would be in the neighborhood of $180 million.

Therefore, the available of $40 million, including $10 million in cash and $30 million with interest at 5.5 percent to compensate for those losses, represents a recovery of 30 to 20 percent, depending upon whether the delay is taken into account. As already noted, this represents a substantial recovery for an investment-related class action.

The Court, however, does not consider the recovery extraordinary or spectacular. In real economic terms, an

average class member with a claim of $6,000 will ultimately receive a note or cash and notes of $1,200. At least some portion of the $1,200 will not be payable for at least five years, and then only if the class member demands payment.

The delay and expense involved in this case is not attributable solely to the defendants. For example, for a substantial period of time the plaintiffs together with the defendants demanded to be able to try this case without time limitations, and estimated that the trial would require some eight months, not a very realistic prospect in a busy urban district. Both sides can be faulted for drawing the case out and for failing to cooperate with each other and the Court.

Further, as Mr. Dodyk has pointed out, after seven years the number of class members actually asserting claims will be significant lower than the class membership. I can [92] also anticipate that the number of class members who end up having approved claims, who will actually demand payment on their notes after five years similarly will decrease, so that the actual dollars paid out will be substantially less than $40 million.

In the Court's opinion, the result is good, but the deferral of the payment obligation for five or 10 years at least has the potential for significantly eroding the benefit to the class in favor of Mr. Grosfeld, and the settlement came late at a significant cost to the class. For these reasons the Court sees this factor, which is really the most important factor, as having no impact on the benchmark.

The ninth factor is the experience, reputation and ability of the attorneys. Plaintiffs have established in their dealings

with the Court and through their Senderowitz declaration that they were experienced in commodities litigation and class action litigation, and that they possessed the reputation to serve reputably as lead counsel in a case such as this, and that they have had the ability to prosecute the case with the highest of the degree of skill. The Court perceives this factor as having no effect on the benchmark.

The tenth factor is the undesirability of the case. Unlike in most viable securities fraud class actions, plaintiffs' counsel had no competition for the responsibility of prosecuting this case. As already noted, the case was [93] unusually difficult and became unusually expensive and time-consuming. This factor weighs in favor of enhancing plaintiffs' counsel fee above the benchmark.

And the eleventh factor is the nature and extent of the professional relationship with the client. The lawyers have represented that prior to this case, class counsel had no relationship with the class representatives except that the Raring and Lipoff firm represented Mr. Waters in a dispute with MOI. This factor is, it seems to me, neutral with respect to the benchmark.

As to other possible Camden One factors, the Court would address the time required to reach a settlement. Pursuant to court order, the parties attended mediation in 1994. The mediation lasted for several days, yet no settlement could be negotiated. The Court is under the impression that thereafter very little was pursued in the way of settlement negotiations until the trial began or it became apparent that the case would actually proceed to trial.

Appendix D

The parties have represented that the settlement negotiations were ongoing throughout the trial, and that the agreement was reached only after several proposals and counter-proposals were made, after all of the evidence had been presented to the jury and the jury instructions and form of verdict had been finally decided upon.

In the Court's experience, this was an unusual route [94] for the case to take, it being the case that most investor litigation settles before trial. This factor militates in favor of an upward adjustment to the benchmark.

There were also unique factors in this case. The plaintiffs' attorneys argue, and the Court agrees, that apart from the usual public policy aspect of any class action, that is, the redress of small claims which individually would be difficult, if not impossible, to prosecute, this case served to put the commodities, boiler room and telemarketing industries on notice that under at least some circumstances a class action might be brought to seek compensation for deceptive and high-pressure sales tactics.

So, for the reasons stated, I do believe that class counsel is entitled to a small upward adjustment in the benchmark of 30 percent, and that the appropriate adjustment is to the percentage of the fund requested by class counsel as its fee, that is, 33 and a third percent, or $13,333,333.

Now, this takes me to costs; and these are the observations I would like to make on the cost issue, and I doubt very much that we are going to be able to conclude the matter of costs today.

* * * *

APPENDIX E — EXCERPTS FROM TRANSCRIPT OF STATUS CONFERENCE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED APRIL 25, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-Civ-UNGARO-BENAGES

WILLIAM WATERS and LINDA BARTHOLOMEW,

Plaintiffs,

– v –

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

Miami, Florida
April 25, 1997
10:42 a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE URSULA
UNGARO-BENAGES
U.S. DISTRICT JUDGE

* * *

[25] THE COURT: Listen, I fully expect it. But, you know what? It's not worth it to try to figure out what it is. Just got to take it day by day.

MR. GOTEINER: Right. Then the record is closed and on appeal. They'll have their declarations, which are an outrage, regarding settlement discussions, and we haven't responded.

THE COURT: Look, the record is open for you to writing anything you want in writing. But there are no motions in front of me. And, so, I don't intend to — with respect to that, and I don't intend to deal with it.

The settlement is what it is. What went on before seems to me to really have nothing to do with anything.

I will say this, which is this case really taught me a lesson. I really made a decision when I came here that I would do nothing off the record, and the very first — of all the cases to have let my guard down in, I chose in this case to do it.

And, so, we sat in my library. I invited everyone in in good faith to come into my library to discuss the settlement off the record because I had real concerns about it, including concerns about the gross settlement amount, including concerns about the amount of attorneys' fees that would be claimed and the amount of costs; and it was my impression then, and it remains my recollection of my impression, then, that the [26] settlement was advocated vigorously by both sides in an effort to overcome my objections to it; that the

Court had specific concerns about the amount of attorneys' fees contemplated to be claimed; that the NERA study was offered by both sides, although it is the plaintiffs who physically produced it, as authoritative; that it was represented to me that the fee award sought was well within the range of common practice in these types of cases; and because I was concerned about the amount of costs, I asked for an estimate at the time.

An estimate was put on the table by the plaintiffs. It is pretty much in line with what the costs have ended up being, and everyone thought that would be perfectly reasonable. That's what matters to me. What matters to me is what went on in my conference room.

Talk to you on Monday.

(Recessed at 11:43 a.m.)

* * * *

APPENDIX F — SEALED AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DENYING PRELIMINARY INJUNCTION UNDER FRAUDULENT TRANSFER CLAIM DATED JULY 10, 1995, *NUNC PRO TUNC* FOR FEBRUARY 21, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-CIV-UNGARO-BENAGES

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTWEST REAL ESTATE, INC., S.S. MELBOURNE, INC. and THE CYPRESS GROUP, INC. et. al.,

Defendants.

SEALED AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PRELIMINARY INJUNCTION UNDER FRAUDULENT TRANSFER CLAIM

THIS MATTER is before this Court upon Plaintiffs' Emergency Motion for Preliminary Injunction under the Fraudulent Transfer Act and Plaintiffs' Motion for Leave to

Appendix F

Amend Complaint to State Claim for Preliminary Injunction under the Fraudulent Conveyance Statute. Pursuant to the agreement of counsel, a hearing was held as to these matters on February 21, 1995.

These motions arise in the context of a class action pending since 1990, alleging violations of the Commodity and Exchange Act (CEA) §§ 4c(b), 13a and 22; the Rules and Regulations of the CFTC, §§ 32.9 and 33.10; the Florida "boiler room" statute, Fla. Slat. § 517.301; the Florida Uniform Fraudulent Transfer Act (UFTA), Fla. Stat. § 726.101 et. seq.[1]; the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(a), 1962(c), and 1962(d); and common law causes of action, including breach of fiduciary duty, breach of contract, common law fraud, and negligent misrepresentation.

This plaintiff class which is comprised of approximately 22,000 individuals seeks damages for the alleged fraudulent practices of Multivest Options, Inc., in connection with the marketing and sale of "exchange traded options" (ETO's)

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1. In the Second Amended Class Action Complaint Plaintiffs claim under UFTA seeks the avoidance of the transfers of the MVRE, SSM, and Cypress stock, worth in excess of $8 million, to Grosfeld an the Jason Grosfeld Trust. In conjunction with the filing of the present Motion, Plaintiffs filed a Proposed Third Amended Complaint, in which Plaintiffs amended their UFTA claim to include Grosfeld's fraudulent transfers to his wife. Plaintiffs additional UFTA claim, unlike the original claim, seeks injunctive relief to prevent Grosfeld's further fraudulent transfer of assets but does not request the avoidance of the prior fraudulent asset transfers.

on commodity futures contracts.[2] Compensatory damages, conservatively could exceed $100 million. From the inception of the case, the only named Defendant who has had the financial capability to satisfy a judgment of this magnitude is Defendant James Grosfeld. However, as explained below, Defendant Grosfeld has been fraudulently transferring individually held assets into joint ownership with his wife, a resident of Michigan.

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2. A futures contract is an agreement to make delivery (to "sell" or to "short" a contract), or to take delivery (to "buy" or to "go long" in a contract) of a commodity at a designated time and place in the future at a price agreed upon when the parties enter into the transaction. Both parties to a futures contract are obligated to fulfill the contract at a specified price, although futures contracts may be fulfilled by making or taking delivery or by entering into an offsetting futures contract. Delivery of the underlying commodity, however, is not made in the vast majority of exchange-traded futures contracts. Instead, the parties typically close out the futures contract prior to the last delivery day of the contract by entering into an offsetting futures position on the relevant exchange. Thus, both buyers and sellers of a futures contract usually close their positions before the contract matures by making an offsetting purchase or sale.

ETOs can either be purchased (taking a "long" position) or sold (taking a "short" position). The purchaser or buyer of an option has the right but not the obligation to take delivery (these are called "call options") or to make delivery (these are called "put options") of the underlying futures contract at a specified price ("strike price"), for a specified period of time. The purchaser of an ETO can exercise it at any time before the expiration date of the option, which is set at the time of the purchase of the options. ETOs on futures contracts are traded on the same exchanges that trade the underlying futures contract.

Appendix F

The Motions presently before this Court seek to address Grosfeld's fraudulent conduct by requesting entry of an order restraining him from further transfers. As the Court explains below Plaintiffs have demonstrated that they will likely prevail on the merits, at least as to the Florida "boiler room" claim. However, as also explained below, the current state of Eleventh Circuit and Florida law precludes the Court from granting the relief sought by Plaintiffs, because UFTA authorizes injunctive relief only in an action to set aside a transfer, which relief is not sought in Plaintiffs Proposed Third Amended Complaint[3] and because Plaintiffs who only seek monetary damages, have an adequate remedy at law.

While the Court believes that it is compelled by current law to deny Plaintiffs' Motions, this Court shares Plaintiffs' concern that at the conclusion of this case, the 22,000 person Plaintiff class may win nothing more than a paper judgment due to Defendant Grosfeld's continued fraudulent dissipation of his remaining assets[4] or due to insurmountable practical difficulties preventing enforcement of any judgment obtained in this forum, in Michigan.[5]

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3. Although Plaintiffs do seek the avoidance of the MVRE, SSM, and Cypress stock transfers in the Proposed Third Amended Complaint, Plaintiffs do not request the avoidance of the fraudulent transfers to Nancy Grosfeld, the transfers at issue in this Motion.

4. The potential for this devastating result is exacerbated by the fact that this Court cannot hear this case prior to May 1996, more than one year from now, due to the fact that the Court has scheduled two criminal trials successively, each of which is anticipated to last approximately four months, beginning in late May 1995.

5. Defendants have represented to this Court that they would vigorously oppose Plaintiffs' efforts to enforce any judgment against

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Appendix F

THIS COURT has considered Plaintiffs' Motions, Defendants' Responses, Plaintiffs' Replies and the supplemental arguments of Counsel at the February 21, 1995 hearing and the pertinent portions of the record, and being otherwise fully advised in the premises, this Court finds as follows:

I. FINDINGS OF FACT

A. The Parties

1. Multivest Options, Inc. (MOI) was in the business of soliciting the public by mass mailings and by telephone, to invest in commodity options and was registered as a futures commission merchant with the CFTC. In early 1990 MOI discontinued doing business and consented to the entry of a preliminary injunction in an action brought by the Commodities Future Trading Commission (CFTC), *CFTC v. Multivest Options Inc.*, Civil Action No. 90-6050-CIV-Zloch (S.D. Fla. 1990).

2. Defendant International Precious Metals Corporation (IPMC) is the parent of MOI, owning 100% of MOI's stock. IPMC also was in the business of soliciting the purchase of precious metals from the investing public. IPMC discontinued active business operations in 1990, due to the CFTC's action against MOI.

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Grosfeld's jointly held assets in Michigan, on a class-wide basis. According to Defendants, Plaintiffs' must obtain individual judgments for each Plaintiff in Florida and then file individual collection actions in Michigan. The Parties have not briefed these issues.

3. Defendant Multivest, Inc. (MVI) is the parent of Defendant IPMC and owns all of IPMC's stock. Plaintiffs allege upon information and belief that MVI was in the business of trading commodities and of running IPMC and other subsidiaries.

4. Defendant James Grosfeld (Grosfeld) was at all relevant times the person who controlled all MVI's stock. Grosfeld owned a substantial majority of the MVI shares and the remaining shares were owned by the Jason Grosfeld Trust, which Grosfeld controlled in his capacity as trustee.[6]

B. History of this Matter

5. On January 23, 1990, the CFTC brought an action against MOI in the United States District Court for the Southern District of Florida, Civil Action No. 90-CV-6050-Zloch. The CFTC Complaint alleged, *inter alia*, that MOI's salespeople solicited customers to purchase ETOs from MOI by means of "hyped telephone sales techniques" which routinely included false, deceptive or misleading statements concerning the risks associated with these types of investments, and the experience and expertise of MOI's

6. Defendant Grosfeld is sued both individually and as trustee for the Jason Grosfeld Trust, a trust set up for the benefit of Grosfeld's minor son and for which Grosfeld serves as trustee. Also named as Defendants are Multivest Real Estate, Inc. (MVRE), S.S. Melbourne, Inc. (SSM), and the Cypress Group, Inc. (Cypress). These Defendants, however, are named solely with respect to specific claims involving fraudulent transfers which Grosfeld made to himself and the Trust at about the time the Commodity Futures Trading Commission (CFTC) sued MOI for fraudulent sales practices and put MOI into receivership.

salespersons. The sales force was alleged to consist of between 135 and 230 salespersons at MOI's offices in Ft. Lauderdale, Florida, Boca Raton, Florida, Newport Beach, Florida, and San Diego, California. *See* Complaint for Preliminary and Permanent Injunctions and Ancillary Equitable Relief, filed on January 23, 1990 in 90-6050-CIV-ZLOCH.

6. On May 9, 1990 the Federal District Court entered an Order of Permanent Injunction and Ancillary Equitable Relief, which *inter alia* permanently enjoined MOI from operating as a futures commission merchant and appointed a receiver to wind down its affairs.

7. On April 23, 1990 this action was filed, in the Northern District of California. Then on August 23, 1990 this matter was transferred to the Southern District of Florida and assigned to Judge James C. Paine.

8. On February 21, 1991, Plaintiffs filed an "emergency" motion for an asset freeze, pursuant to Rule 65, Fed.R.Civ.P. This Motion was denied by Judge Paine on November 19, 1991 (D.E. #88).

9. On October 11, 1991 this case was reassigned to Judge Shelby Highsmith and then on December 23, 1992, this matter was reassigned to this Court.

10. On March 1, 1993, Magistrate Judge Brown recommended that Plaintiffs' Motion for Class Certification be granted (D.E. # 137); and, on June 25, 1993, this Court entered its order adopting the Magistrate Judge's Recommendation to certify a class (D.E. # 150).

11. On November 17, 1993, Plaintiffs' filed a Renewed "Emergency" Motion for a Temporary Restraining Order and Preliminary Injunction pursuant to Rule 65, Fed.R.Civ.P. That motion was denied on November 24, 1993 (D.E. # 215) because Plaintiffs could not demonstrate that they lacked an adequate remedy at law.

B. The Asset Transfers

12. In April, 1990, Defendant Grosfeld transferred $31 million worth of Treasury Bills in several installments from his exclusive ownership to joint ownership with his wife, Nancy Grosfeld. *See* Schedule of Transfers-Spouse, Dep. Exh. 1, Exhibit H to the Declaration of Neil A. Goteiner in Support of Plaintiffs' Emergency Motion for Preliminary Injunction Under Fraudulent Transfer Claim; Emergency Motion in the Alternative for Leave to File Amended Complaint; and Emergency Motion in the Alternative for Preliminary Injunction under Proposed RICO Claim (dated January 17, 1995) (hereafter "Goteiner Decl.").[7]

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7. Mr. Grosfeld has produced little reliable evidence as to when this transfer actually occurred, especially as to the first installment of the transfer, which Grosfeld says he recalls occurring on April 23, 1990 — the day the complaint in this case was filed. Deposition of James Grosfeld (hereafter "Grosfeld depo."), November 30, 1994, 44:2-13, Goteiner Decl. Exh. G. In response to Interrogatories, Grosfeld prepared a document entitled "Schedule of Transfers-Spouse" which stated only that the transfers occurred in April, 1990. Dep. Exh. 1, Goteiner Decl. Exh.H. Grosfeld's counsel later sent via facsimile what purports to be a couple of unsworn (one is even unsigned) bank memoranda indicating that certain funds were transferred from Grosfeld's individual custodial account to a joint

(Cont'd)

13. In November, 1993 Defendant Grosfeld transferred approximately $8.5 million worth of stock in the Copart Corporation from his exclusive ownership to joint ownership with his wife, Nancy Grosfeld. *See* Dep. Exh. 1, Goteiner Decl. Exh. H; Grosfeld depo. November 30, 1994, 55:8-59:8, Goteiner Decl. Exh. G.

14. In January, 1994 Defendant Grosfeld transferred approximately $1 million in cash and $18 million in limited partnership interests from his exclusive ownership to joint holdings with his wife, Nancy Grosfeld. Dep. Exh. 1, Goteiner Decl. Exh. H.

15. Prior to these transfers, James Grosfeld had a net worth in excess of $126 million and all of his assets were held individually with the exception of residences valued at approximately $2 million and a single bank account valued at between $0 and $10 million. Grosfeld depo. November 30, 1994, 47:1-17, Goteiner Decl. Exh. G. As a result of these transfers, Grosfeld's individually held assets have an approximate value of $68 million. Grosfeld Decl. P 12.

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custodial account on April 23, 1990. Goteiner Decl. Exh. R. No other documentary evidence relating to the joint custodial account or the April 23 installment was produced. The documentary evidence from March and April of 1990 relates solely to the joint money market checking account (No. 160977067), which was opened in March and to which the second installment of funds was apparently transferred on April 28, 1990. Goteiner Decl. Exh. R; Exhibit B to Defendant James Grosfeld's Preliminary Response to Plaintiffs' Supplemental Brief on Plaintiffs' Motion for Preliminary Injunction Under Proposed Fraudulent Transfer Claim.

16. The transferred assets have increased in value such that over $100 million of assets are now held as joint assets. *See* Calculations and citations to evidence in Plaintiffs' Emergency Motion for Preliminary Injunction Under Fraudulent Transfer Claim, at 7-10 and nn. 16, 17, 18, and 19; Grosfeld depo., November 30, 1994, 25:3-23; 85:4-87:7, Goteiner Decl. Exh. G.

1. Evidence of Actual Fraudulent Intent

17. Defendant Grosfeld made the transfers with actual intent to hinder, delay, or defraud his creditors.

18. The transfers from Grosfeld bear the following badges of actual fraudulent intent, as defined by the Uniform Fraudulent Transfer Act, Fla. Stat. § 726.105(2) (hereinafter UFTA): the transfers lacked consideration; the transfers were to a family member; there was pending or threatened litigation against Grosfeld at the time of the transfers; there was insolvency of substantial indebtedness on Grosfeld's part when the transfers were made; the transfers were concealed from Plaintiffs and the Court; and Grosfeld retained control over the transferred property.

19. Grosfeld received no consideration in exchange for the transfers. Grosfeld depo. November 30, 1994, 44:2-13, 50:1-51:2, 60:17-22, 61:3-62:4, Goteiner Decl. Exh. G.

20. All transfers were made to Defendant Grosfeld's wife, Nancy Grosfeld, a resident of Michigan. *Id.*

21. All transfers occurred when Grosfeld was either a potential Defendant in a threatened action or a named Defendant in a pending matter. The first transfer of assets occurred in late April 1990. Although the transfer occurred prior to the filing of this action Groseld had knowledge of his potential liability to the Plaintiff class and knowledge that a class action arising from the actions of MOI, was likely to be filed.

22. Grosfeld must have been aware of his potential liability or MOI's actions because during the pendency of the CFTC action, specifically from January 23, 1990 to March 8, 1990, Grosfeld's attorneys were concerned that Grosfeld would be named as a Defendant in the CFTC matter, and during the settlement negotiations in William Waters' administrative action against MOI, in early April 1990, Plaintiffs' Counsel specifically discussed with Grosfeld's Counsel, the fact that Grosfeld was potentially liable for MOI's conduct. Robert Jackson notes, Dep. Exh. 425, Goteiner Decl. Exh. J. *See* Dep. Exh. 737, Exhibit 32 to Declaration of C. Brandon Wisoff in Opposition to Defendants' Motion *in limine* Regarding Alleged Hearsay Evidence, Including the Isakow "Observations" Report (D.E. 490); Consent to Order Appointing Temporary Administrator by Multivest Options (March 8, 1990) in *Commodity Futures v. Multivest Options,* Civ. No. 90-CIV-6050-ZLOCH (D.E. 13); Goteiner Decl. Exh. S.

23. The following events further illustrate that Grosfeld had knowledge that an action was likely to be filed against him and others, after the resolution of the CFTC action: during March and April 1990, Plaintiffs' counsel openly

investigated MOI's operations, including interviewing an MOI attorney, an MOI Officer, and numerous former MOI employees; upon settlement of the CFTC suit, Grosfeld was informed by several MOI attorneys that the potential existed for a class action following the conclusion of the enforcement action; on April 24, 1990, Larry Hunter, an attorney who represented Grosfeld for many years in a variety of matters, including the enforcement action against MOI, contacted Plaintiffs' counsel regarding the class action Complaint, which was about to be filed; and then on April 24 and 25, 1990 Plaintiffs' counsel corresponded with Mr. Hunter about the impending class action. Goteiner Decl. P 4-9; Goteiner Decl. Exh. A, B, G, I, L; Grosfeld depo. September 30, 1994, 1111:24-1112:4, 1209:10-1211:1; Deposition of Robert Jackson, 21:16-25; Deposition of Larry Hunter, 29:1-13; 131:2-12; 386:22-387:20.

24. When the second and third transfers were made this matter was pending, Grosfeld had been named as a Defendant, and Grosfeld clearly had knowledge of his potential liability.

25. The transfers occurred concurrently with key events of the case. The April 1990 transfer occurred contemporaneously with the filing of the action. The November 1993 transfer was made shortly after Plaintiffs filed their Motion for Summary Adjudication of Grosfeld's Liability under the Boiler Room Statute. Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 56 for Summary Adjudication of Defendants' Liability Under Florida's Boiler Room Statute (D.E. 184.) And the January 1994 transfers were made around the time the Court ordered Grosfeld's counsel to produce

attorney-client documents relating to MOI which contained potentially adverse references to the shutdown of MOI by the CFTC. Order of Reference to Special Master dated November 30, 1994 (D.E. 218); *see e.g.* Dep. Exh. 425, Goteiner Decl. Exh. J.

26. Grosfeld knowingly rendered himself insolvent by decreasing his individual net worth until it was insufficient to satisfy a potential judgment. Grosfeld was aware, prior to the transfers, that the potential damages in this matter could conservatively exceed $100 million.[8] Grosfeld's knowledge stemmed from MOI's own records and the facts and allegations contained in the CFTC Complaint. *See* Exhibit 26 to the Declaration of C. Brandon Wisoff in Support of Plaintiffs' Evidentiary Submission in Support of Motion for an Order Compelling Defendant to Disclose Financial Information Relevant to an Assessment of Punitive Damages (D.E. 339) (Hereafter "Wisoff Decl.") (MOI generated records in 1989, which were fully accessible to Grosfeld, documented that the Plaintiff class had lost at least $77 million in commissions); Dep. Exh. 737, Exhibit 32 to the Declaration of C. Brandon Wisoff in Opposition to Defendants' Motion *in Limine* Regarding Alleged hearsay Evidence, including the Isakow "Observation" Reports (CFTC Complaint alleged that from June 1987 to October 1989 MOI customers lost approximately $72,708,000 on a total investment of $96,482.600 and that MOI customers paid commissions of over $61,000.000). And yet Grosfeld transferred in excess of $58 million, decreasing his individual

8. Damages under the Florida "boiler room" statute alone, could potentially exceed $300 million. *See Kane v. Shearson Lehman Hutton, Inc.*, 916 F.2d 643, 646 (11th Cir. 1990).

net worth to $68 million, which was clearly insufficient to satisfy his potential liability.

27. On November 23, 1993, Grosfeld informed this Court that he was not "secreting" assets, in order to frustrate a judgment in this case. Transcript of Proceedings, November 23, 1993 at 77, Goteiner Decl. Exh. C. And yet contemporaneously, Grosfeld transferred at least $8.5 million worth of Copart stock from individual holdings to joint ownership with his wife. An then in January 1994, Grosfeld transferred an additional $19 million in assets to joint ownership with his wife.

28. Lastly, Grosfeld retained control of the transferred property by maintaining a joint undivided interest in the entireties, in the property.

2. Evidence of Constructive Fraud

29. The asset transfers rendered Grosfeld insolvent, as defined by UFTA. *See* Fla. Stat. s. 726.105(1)(b).

30. Damages in this action could conservatively exceed $100 million. After the asset transfers, Grosfeld's individually held assets totalled approximately $68 million. Grosfeld Decl. P 12. As a result of Grosfeld's asset transfers in excess of $58 million, Grosfeld's individually held assets were insufficient to satisfy a potential judgment and therefore, Grosfeld was insolvent.

Appendix F

II. CONCLUSIONS OF LAW

1. This Court finds as a matter of law, that *James Grosfeld's asset transfers were intentionally fraudulent*, as defined by UFTA. *See* Fla. Stat. § 726.105(1)(a).

2. This Court finds as a matter of law, that *James Grosfeld's asset transfers were constructively fraudulent*, as defined by UFTA. *See* Fla. Stat § 726.105(1)(b).

3. While this Court believes that UFTA was designed to prevent the frustration of potential judgments in circumstances similar to those presented by this case, the plain language of UFTA and controlling Eleventh Circuit precedent require the Court to find that Plaintiffs are not entitled to the preliminary injunction sought under UFTA.

4. The plain language of the UFTA provides that remedies are available to creditors "in an action for relief *against a transfer or obligation*. . . ."[9] Neither the Second

9. Fla. Stat. § 726.108 provides:

(1) *In an action for relief against a transfer or obligation* under §§ 726.101-726.112, a creditor, subject to the limitations in Sec. 726.109 may obtain:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law;

(Cont'd)

Amended Complaint nor the Proposed Third Amended Complaint seek relief against Grosfeld's transfers to his wife.[10] Accordingly, Plaintiffs are not entitled to the relief sought.

5. The plain language of the UFTA further provides that the remedies available to creditors under UFTA are "[s]ubject to applicable principles of equity. . . ." *See* Fla. Stat. § 726.108(1)(c). The applicable principles of equity that must be satisfied under UFTA are a substantial likelihood of success

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> (c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
>
> 1. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
>
> 2. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
>
> 3. Any other relief the circumstances may require.
>
> (2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

(*emphasis added*).

10. In the Second Amended Complaint and Proposed Third Amended Complaint Plaintiffs seek recovery of money damages exclusively.

on the merits; irreparable harm; an inadequate remedy at law; and that the relief sought serves the public interest. *See e.g. Lindholm v. Holtz*, 581 N.E.2d 860, 862-63 (Ill.App. 1991) (equitable standard for preliminary injunction under UFTA requires" 1) a certain right in need of protection; 2) the injunction is necessary to prevent an irreparable injury; 3) there is no adequate remedy at law; 4) plaintiff has a substantial likelihood of success on the merits; and 5) without the preliminary injunction, plaintiff will suffer greater harm than defendant would if the injunction were to issue."); *Bowman v. Dixon Theatre Renovation*, 581 N.E. 804, 807 (Ill. App. 1991) ("plaintiff must establish that he possesses a clearly ascertainable right which needs protection; that he will suffer irreparable harm without the injunction; that there is no adequate remedy of law for his claim; and that he is likely to succeed on the merits of his action.").

6. Plaintiffs have a substantial likelihood of success on the merits, at least as to the "boiler room" claim. The Florida "boiler room" statute, Fla. Stat. § 517.312, provides in pertinent part, that it is unlawful "to directly or indirectly manage, supervise, control, or own, either alone or in association with others, any boiler room in this state which sells or offers for sale any security or investment in violation of [§ 517.301 or § 517.311]."[11] On July 21, 1994 this Court ruled that Defendant

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11. Fla. Stat. § 517.312 provides as follows:

(1) It is unlawful and a violation of this chapter for any person:

(a) To offer or sell, in this state or from this state, any security or investment when such offer or sale is in violation of s. 517.301 or s. 517.311; or

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Grosfeld, IPMC, and MVI would be liable, under Fla. Stat. § 517.312, for any violation by MOI of Fla. Stat. § 517.301 or § 517.311. *See* Order Granting Plaintiffs' Motion for Partial Summary Judgment on the Issue of Defendants' Liability under Florida's Boiler Room Statute at 17-18. This ruling was based on this Court's findings that MOI was in fact a "boiler room;"[12] that ETOs constitute "investments;"[13] and that the Defendants,

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> (b) To directly or indirectly manage, supervise, control, or own, either alone or in association with others, any boiler room in this state which sells or offers for sale any security or investment in violation of paragraph (a).
>
> (2) Any purchaser of a security or investment sold in violation of subsection (1) is entitled to rescind such purchase at any time and recover damages as provided in s. 517.211(3)(a), (4), and (6).

12. This finding is in accordance with the plain language of § 517.021(3), which defines a "boiler room" as "an enterprise in which two or more persons engage in telephone communications with members of the public using two or more telephones at one location, or at more than one location in a common scheme or enterprise." Fla. Stat. § 517.021(3). The undisputed facts confirm that MOI employed many salespersons, using telephones in various geographic locations, to sell and promote the sale of ETOs to the public.

13. This finding is in accordance with the plain language of the statute, specifically § 517.312 and § 517.301(2). Fla. Stat. § 517.301(2) defines an investment for purposes of § 517.312, as

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including Grosfeld, would be liable as "owners" for the actions of MOI."[14] *Id.*; *see also* Order Denying Defendants' Motion for Partial Summary Judgement Determining that the Accounts of Plaintiff Waters and Bartholomew Did Not Constitute an "Investment" Within the Meaning of F.S. § 517.301(2) at 2. To establish a claim under § 517.301 Plaintiffs must prove that "in connection with a securities transaction, they . . . were proximately harmed by, a false representation or omission of a material fact negligently made by [the other party]." *See First Union Brokerage Service v. Milos*, 997 F.2d 835, 844 (11th Cir. 1993) (*citing Gochnauer v. A.G. Edward & Sons, Inc.*, 810 F.2d 1042, 1046 (11th cir. 1987). Plaintiffs are required to prove "transaction causation" but not "loss causation." *See E.E. Hutton & Co. v. Rousseff*, 537 So.2d 978, 981 (Fla. 1989) ("proof of loss causation is not required in a civil securities proceeding under sections 517.211 and 517.301, Florida Statutes."). Based on the facts of this case and the minimal elements which must be proven under § 517.301, this Court concludes that Plaintiffs have a substantial likelihood of success on the merits, as to the Florida "boiler room claim."

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"any commitment of money or property principally induced by a representation that an economic benefit may be derived from such commitment." Fla. Stat. § 517.301(2). The undisputed facts establish that Plaintiffs committed money to purchase ETOs when MOI was marketing the ETOs by representing that economic benefits could be derived from the transaction. Accordingly, the ETOs constituted investments, for purposes of the "boiler room" statute.

14. Defendants, including Defendant Grosfeld are liable under § 517.312(b) because they "directly or indirectly manage[d], supervise[d], control[led], or own[ed] either alone or in association with others, any boiler room."

7. Plaintiffs seek to recover money damages, which is well-established as an adequate remedy at law.[15] *See* Plaintiffs' Second Amended Complaint and Proposed Third Amended Complaint[16]; *Rosen v. Cascade International, Inc.*, 21 F.3d 1520, 1527 (11th Cir. 1994) ("[i]t is axiomatic that equitable relief is only available where there is no adequate remedy at law; cases in which the remedy sought is the recovery of money damages do not fall within the jurisdiction of equity"). The recoverability of the awarded damages is irrelevant to whether or not an adequate remedy at law exists. *See Mary Dee's Inc. v. Tartmella*, 492 So.2d 815, 816 (Fla 4th DCA 1986) ("test of inadequacy of remedy at law is whether a judgment can be obtained, not whether, once obtained, it will be collectible."); *Hiles v. Auto Bahn Federation, Inc.*, 498 So.2d 997, 998 (Fla. 4th DCA 1986) ("possibility that a money judgment, once obtained, will not be collectible is irrelevant under the test of inadequacy of remedy at law." (*citation omitted*).

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15. Some jurisdictions have found that preliminary injunctions are appropriate when the defendant intends to frustrate judgment on the merits by transferring assets out of the country. *See e.g. In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985); *Products Carnic S.A. v. Central American Beef & Seafood Trading co.*, 621 F.2d 683, 686 (5th Cir. 1980). Although these exceptions are not applicable to this case under the present facts, a change of circumstances *will* cause this Court to reconsider the applicability of these exceptions.

16. This Court granted Plaintiffs leave to file a Proposed Third Amended Complaint which alleged a cause of action under UFTA sufficient to encompass Plaintiffs requested relief. *See Lawhon v. Mason*, 611 So.2d 1367, 1368 (Fla. 2d DCA 1993) (respondents not entitled to recovery under UFTA because not sufficiently alleged in complaint).

Based on the foregoing discussion, it is hereby,

III. ORDER

ORDERED and ADJUDGED that Plaintiffs' Emergency Motion for Preliminary Injunction under Fraudulent Transfer Claim is DENIED.

It is further ORDERED and ADJUDGED that Plaintiffs' Motion for Leave to Amend Complaint to State Claim for Preliminary Injunction under the Fraudulent Conveyance Statute is DENIED. Plaintiffs' Proposed Third Amended Complaint is STRICKEN.

It is further ORDERED and ADJUDGED that notwithstanding this decision, should Defendant Grosfeld make *any additional constructive or intentionally fraudulent transfers* under the terms of UFTA, this Court will seriously reconsider this issue.

DONE AND ORDERED in Chambers at Miami, Florida, this 10 day of July, 1995, *nunc pro tunc* for February 21, 1995.

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

APPENDIX G — DECLARATION OF STEPHEN SENDEROWITZ REGARDING APPLICATION FOR FINAL APPROVAL OF CLASS COUNSEL'S ATTORNEY'S FEES AND COSTS DATED FEBRUARY 20, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-6863-
CIV-UNGARO-BENAGES

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

DECLARATION OF STEPHEN SENDEROWITZ REGARDING APPLICATION FOR FINAL APPROVAL OF CLASS COUNSEL'S ATTORNEY'S FEES AND COSTS

Appendix G

INTRODUCTION AND SUMMARY OF FINDINGS

1. This declaration summarizes testimony that I would be prepared to offer concerning plaintiffs' application for attorneys' fees in this case. This testimony relies on data collected by plaintiffs' counsel, data I collected, and my experience in the commodities area. I understand that plaintiffs' counsel has already provided empirical data to the Court.

2. In my opinion, an award to plaintiffs' counsel of one third of the $40 million settlement plus costs is fair, reasonable and appropriate. This opinion is based upon the following conclusions:

a. A 33 and 1/3% fee award is within the Eleventh Circuit guidelines on class counsel compensation.

b. The recovery obtained by class counsel in this case was extraordinary in comparison to the average recovery in such actions.

c. The class action was extremely complex and was prosecuted by two law firms over seven years at enormous expense and risk. The small "windfall" above the law firms' lodestar is amply justified both as an appropriate contingent reward for their efforts and to encourage such efforts by other law firms which undertake to attack boilerroom fraud in South Florida.

3. After describing my background, below, I provide additional support for my opinion.

II. BACKGROUND AND QUALIFICATIONS

4. I am a practicing attorney in Chicago, where I have been a member of the bar since 1974. I am a principal of Schwartz, Cooper, Greenberger and Krauss, Chtd. where I chair the firm's litigation department. I received my B.A (1971) and law (1974) degrees at Northwestern University. Upon graduating from law school, I was a trial attorney for the Equal Employment Opportunity Commission (1974-75), and then served as Assistant United States Attorney for the Northern District of Illinois (1975-83). I was appointed Deputy Chief of the Criminal Division (1979), and was placed in charge of all financial crime prosecutions, including commodity cases. The world's largest commodity futures exchanges are located in Chicago and the Chicago U.S. Attorney's Office is the most active prosecutor of commodity fraud cases in the country.

In 1983, I was appointed Deputy Chief of the Special Prosecution Division, and continued to supervise all commodity cases. These cases involved both on-market, and off-market or boilerroom cases. One of my projects was prosecuting Florida boilerroom operators who were victimizing Illinois residents, in the sale of illegal commodity options contracts.

While in the United States Attorney's Office I was requested by the FBI to train its agents in commodity investigations. I was also appointed by the Attorney General

of the United States to head the Commodity Sub-committee of his Economic Crime Council. This position included the responsibility to draft for the Attorney General a nationwide plan to prosecute boilerrooms based on the victim venue concepts developed by me and my assistants in Chicago.

5. In 1983, I left government service and have concentrated in handling complex civil and criminal litigation and regulatory matters, including financial, commodities and securities cases on behalf of corporations, CFTC and SEC registrants and customers.

6. My practice is nationwide, and I have been admitted to practice and prosecuted and defended commodity and securities cases in Federal courts in Illinois, California, Massachusetts, Arkansas, Missouri, Nevada, Michigan, New York, Ohio, Pennsylvania, Tennessee and Texas.

7. I have authored articles published in various publications such as *Futures Magazine*, *Commodities Trading: Trading Practice Under Scrutiny*, (Prentice Hall Law and Business); *New Developments in Commodity Futures Regulation and Enforcement - 1989* (Practicing Law Institute), and the *Illinois Bar Journal- 1990*. I have sat on various commodities and securities seminars for the Practicing Law Institute and Chicago Kent School of Law Commodities Institute. I have also taught ethics courses to commodity brokers, who are required to receive such training pursuant to federal regulation. In 1989, I was appointed Deputy Special Prosecutor for the Chicago election fraud project.

8. I have represented parties in two certified commodities class actions, including *In the Matter of First Commodity Corporation of Boston*, where I represented the individual owners of FCCB and *Kashwer v. Global Precious Metals and Jefferson National Bank*, where I was co-counsel on behalf of plaintiffs. (See discussion at ¶ 17 below.)

9. I have never worked with the Farella firm or with the Raring & Lipoff firm, although I am aware of Mr. Goteiner's reputation as an exceptional commodities law litigator. My contact with Mr. Goteiner includes being Mr. Goteiner's adversary in two extremely hard fought commodities litigations, one involving a putative commodities class action in the retail commodities area. In that class action I joined as co-counsel other well known commodities class plaintiffs' counsel. That commodities class action, like this one, involved allegations of company wide high pressure tactics and fraudulent practices to persuade customers to engage in excessive trading in non-discretionary accounts. The trial court at first certified the class, but Mr. Goteiner was able to persuade the appellate court that the action was improperly certified and to vacate the certification order. The class in that action was not certified again after the vacatur. Class certification is perhaps the hardest fought issue in commodity class actions, and typically revolves around the uniformity of the alleged misrepresentations made to the class members.

III. FACTS SUPPORTING MY OPINION

Complexity of the Case

10. Plaintiffs' recovery in the instant case is much better than would be suggested by a comparison with the average

class action recovery. As a commodities class action, plaintiffs' case was far more difficult to have certified, to maintain and to prove than the average securities class action fraud on-the-market case.

11. I understand that the Court has stated on the record in this case, that plaintiffs' class action theory was far different than the average fraud on-the-market theory since it involved commodities being traded in non-discretionary accounts and required the Court to interpret the Florida Investor Protection Act and Commodity Exchange Act in a way that no other Court has interpreted it. While the facts suggested that there should be a class-wide remedy, the law did not readily supply the theory on which to base the class-wide remedy, while protecting defendants' due process rights. This contrast makes the statistically significantly "above average" recovery all the more meaningful to support plaintiffs' requested one-third fee plus costs.

Comparative Cases

12. Comparing recoveries in other class actions, or governmental regulator actions, underscores how significantly above average this recovery was. I am not aware of any investor recovery in commodities litigation of this sort (either in the class or regulatory context) that approaches what plaintiffs managed to produce here.

Securities Cases

13. The most recent data on class action settlements and fees is to be found in a study conducted by the National

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Economic Research Associates ("NERA") entitled "Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?" prepared by Denise N. Martin, Vinita M. Juneja, Todd S. Foster, and Frederick C. Dunbar (hereinafter "NERA study"). I understand that plaintiffs have already provided a copy of the NERA study to the Court during the preliminary settlement conferences during the week of January 27, 1997. I attach another copy hereto as Exhibit A.[1]

The NERA study covered a period of six years from January, 1991 through June 1996, and looked at shareholder class action case dispositions over that period. NERA's database included 998 cases that were dismissed, settled or resolved by jury verdict during this time period (NERA, at 9).

The NERA study showed that the typical monetary recovery in a class action settlement (calculated as a percentage of class losses and before attorneys fees), was slightly more than 1/4 the recovery in this case.[2] NERA

1. I note from Table 16 that the NERA study did not consider limited partnership cases in 5 out of the 6 years reviewed. These settlements would have affected the average figures reported by NERA.

2. I base this on my understanding that the $40 million recovery is approximately 1/3 of the approximately $119,000,000 in out-of-pocket losses incurred by the class members. I am also assuming that the value of the $30 million in promissory interest bearing notes to be the face value of the notes. This is because the notes are bearing interest and because plaintiffs could, if they wanted to, borrow against the notes, or keep the notes until maturity in 5 years, and then keep them for another five years depending on interest rates as of that time.

calculated the average and median ratio of settlements to plaintiffs' claimed damage and investor losses by settlement amount. (NERA, at 11.) Table 8b of the NERA study considered in part just the 47 settlements in the $10-49.9 million settlement range. Considering just this range of settlements (which includes the settlement amount here), the average settlement as a percentage of investor losses was 9.12%; the median was 5.4%. Considering all 331 settlements ranging from small settlements of under $1 million to settlements of over $50 million (there were only 3 such large settlements reported by NERA), the average settlement as a percentage of investor losses was 9.13% with the median being 5.89%. (*Id.*)

14. For additional comparison purposes, I looked at settlements in securities class action suits involving common stock only (NERA Table 7b). Considering only the January-June 1996 period and the 47 settlements that occurred during that period, the average settlement as a percentage of investor losses was 9.04%, with the median settlement as a percentage of investor losses being 6.84%. Considering all 331 cases over the 1991 to June 1996 period, the average settlement as a percentage of investor losses was 9.13%.

These percentage figures therefore show that the settlement here of slightly over 1/3 of the class' out-of-pocket losses was, relative to these other recoveries, far above average. Thus the instant settlement-to-loss ratio is a healthy multiple of the average and median recoveries for recent securities class action settlements.

15. A study commissioned by the Federal Judicial Center[3] showed that the median gross monetary settlement in class actions in the Southern District of Florida was $2,450,000 (at 149). A $40 million recovery is therefore a relatively large amount, and bound to have a cautionary impact on the industry (particularly in South Florida), since it must be assumed that the industry will understand that this is a large recovery in class action cases.

Other Class Actions

16. The Judicial Center's 1996 study of class actions in four federal district courts considered both securities and other types of class actions. This study included the Southern District of Florida, and concluded that the median settlement in these four courts ranged from $1.98 million in the Eastern District of Pennsylvania, to $2.45 million in the Southern District of Florida, to $5.1 million in the Northern District of California. *See* Judicial Center Study, Figure 70 at 149.[4]

Commodity Cases

17. I was involved as defense counsel in *In re: First Commodities Corporation of Boston Class Action*, No. MDL

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3. Willging, Hooper and Niemic, "An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996) (hereinafter "Judicial Center study")

4. The Judicial Center selected these districts as well as the Northern District of Illinois because these districts had considerable experience in class action litigation.

713 (D. Mass). That action, filed in 1986, alleged widespread fraudulent retail sales practices in the sale of futures and option contracts to FCCB customers. *See In Re: FCCB*, 119 F.R.D. 301 (D.Mass.1987).

The CFTC first sued FCCB, and then private counsel filed a class action. Alleged customer losses in that class action exceeded $500 million, and the settlement was $5.3 million, or a percentage recovery of about 1.4%.

In Re: International Trading Group, Ltd. Customer Account Litigation, Civil Action No. CV 89-5545 RSWL (GHKx) (C.D. Cal.), was, according to plaintiffs' counsel in that case, a commodity option case. Of over $490 million in ITG's customer losses, plaintiffs counsel collected approximately $7 million for the class, or a percentage recovery of about 1.5%.

Kashwer v. Global Precious Metals and Jefferson National Bank, (N.D. Ill.), was a class action against a bankrupt broker and the bank which financed customer purchases of the precious metals contracts sold by the broker to plaintiffs. Plaintiff losses were allegedly over $16 million. The plaintiff class received $2.58 million from the bank in settlement, or a percentage recovery of about 16%.

Counsel involved in *In re: Precious Metals Litigation, MDL Docket No. 941*, (C.D.Cal), another bank-financed precious metals class action, has advised undersigned that the case was settled in 1994 for $1.9 million and involved over $80 million in customer losses, or a percentage recovery of no more than 2.4%.

In summary, when comparing the settlement here to other commodities class actions with which I am familiar, it is also apparent in terms of both the absolute amount of recovery as well as the loss-recovery ratios, that this instant settlement was extraordinary.

VI. RECOVERY OF INDIVIDUAL CLASS MEMBERS AND RELATIVE SUCCESS

18. Another significant criterion of plaintiffs' success is the individual recovery to be obtained on average by the class members. After the requested attorneys fees and costs, I am advised that the individual class members here will recover on average $1200. The Judicial Center study found that the average median individual recovery across the four districts averaged from $315 to $528 (at 13). The Southern District of Florida had the lowest, at $315. Also in the Southern District of Florida, 75% of the awards were $715 or lower, and the maximum was $1,505 (Figure 1, at 112). Thus the class members here will recover considerably more both absolutely, and on a recovery-loss basis, than in the average class action, notwithstanding that a retail commodities class action is a more difficult class action to bring and to maintain. Indeed the average recovery of $1200 will be close to the maximum recovery noted in the Judicial Center study for the Southern District.

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VII. THIS SETTLEMENT COMPARED TO RECOVERY IN GOVERNMENT REGULATORY ACTIONS

19. I am generally aware of actions brought by the U.S. Attorneys and by the CFTC, and have followed these actions over the years. I am not aware of any commodity regulatory actions which have returned to investors anything close to the recovery obtained by plaintiffs at bar. This is true both in terms of the size of the fund, as well as when considering the ratio of recovery to losses, as well as the average size of the recovery. In the typical boilerroom prosecution by the United States Attorney's Office, while the defendants are almost always convicted and imprisoned, little if any financial recovery is obtained for the victims.

VIII. DATA ON FEE AWARDS

20. Regardless of case size, fees average approximately 32% of the settlement according to the NERA study (at 12-13). In summarizing the data for settlements in the $10-49.9 million range, NERA reported that the average attorney fees (excluding costs) as a percentage of settlement was 31.72% and that median attorneys fees as a percentage of settlement in this range was 33.15% (NERA, Table 9).

21. NERA also reported that the average attorney fees *and* expenses totaled 34.94% of all recoveries, with the median being 34.64%. When plaintiffs' costs are added to their requested one-third fees, this total amount will be 38% of the settlement fund. While plaintiffs' counsel's requested aggregate amount will be greater than the average fees and costs recovery, it is justified for the reasons herein discussed.

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IX. CONSIDERATION OF ADDITIONAL FACTORS IN DETERMINING REASONABLENESS OF FEES

Camden I

22. Plaintiffs' one-third request of $13,333,333 is not significantly greater than what I am advised is plaintiffs' lodestar at 1997 rates ($12,634,000), so that plaintiffs are not asking for any significant multiplier over their fees, and only a small adjustment for the risk and time cost of money and their investment of the considerable out-of-pocket costs ($2.6 million in costs). In this regard, the percentage approach, required by *Camden I Condominium Association, Inc. v Dunkle*, 946 F.2d 768 (11th Cir.1991), would not result in any significant windfall to plaintiffs' counsel.

Length of Case

Class actions rarely get this far, and almost never last this long from the date of filing. This case was filed in April 1990, and ended in January 1997, after 5 months of trial. The Federal Judicial Center study determined that in the Southern District of Florida the median time from filing to disposition of securities class actions to be 17.5 months (Judicial Center study at 117, Figure 10). In the Northern District of Illinois the median was 19.9 months and in the Northern District of California it was 23.7 months (*id.*).[5]

5. It is because of this extraordinarily length, and the commensurate risk that plaintiffs' counsel endured, that it is appropriate and fair that the median fee recovery rate of 27% in this district be adjusted upwards to take account of these factors (*see* Judicial Center study, at 147).

Thus, this class action obviously took far longer than the average securities class action to resolve. This means that plaintiffs had to fund this action with its considerable costs, and to delay their receipt of any reimbursement and fees more than four times as long as other plaintiffs' attorneys in this District. Given the time value of money, a delayed fee is a reduced fee, and this factor alone could justify a higher than average fee award.

Risk Factors

23. This risk factor was particularly significant here. I am advised the Farella firm and Raring & Lipoff firm shouldered the risk and burden of this litigation by themselves. Often, there are at least 5-10 firms that share the burden in such cases.

X. CONCLUSION

24. In conclusion, I believe that the requested fee equal to one third of the settlement fund, plus costs is entirely reasonable. It is both justified in this case and justified for the motivation it creates for future cases against other retail commodities firms, particularly in South Florida where it is well known that commodities boiler rooms have proliferated. Further a lesser fee award might telegraph to other plaintiffs' attorneys in similar cases in the future to settle cheaply and not to resist the defendants' litigation onslaughts and low settlement offers. A lesser fee award may indicate to plaintiffs' attorneys that to hold out for more, and to go to trial, would only result in increased risk for the attorneys with no upside benefits.

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I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

s/ S. Senderowitz
Stephen J. Senderowitz

February 20, 1997
Chicago, Illinois

APPENDIX H — DECLARATION OF NEIL A. GOTEINER IN RESPONSE TO THE APRIL 24, 1997 DECLARATIONS OF MARTIN KAMINSKY AND PAUL DODYK DATED MAY 5, 1997 AND FILED MAY 6, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-6863-
CIV-UNGARO-BENAGES

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

DECLARATION OF NEIL A. GOTEINER IN RESPONSE TO THE APRIL 24, 1997 DECLARATIONS OF MARTIN KAMINSKY AND PAUL DODYK

I Neil A. Goteiner declare as follows:

1. I am a member of the law firm of Farella Braun & Martel LLP. I am licensed to practice law in the States of California and New York.

2. I am submitting this declaration in opposition to certain statements in the April 24, 1997 declaration of Martin Kaminsky and the April 24, 1997 declaration of Paul Dodyk.

3. Mr. Kaminsky states that "most" of his settlement discussions with me were off the record. In fact we explicitly agreed that all of those settlement discussions were off the record. All those discussions were privileged pursuant to Rule 408 of the Federal Rules of Evidence, and are irrelevant and improper to bring before this Court's attention.

4. To correct the false record created by Mr. Dodyk's and Mr. Kaminsky's declarations, I respond to their claims that plaintiffs' fees and expenses were the result of plaintiffs' counsel intransigence and unreasonable settlement position. The truth is that defendants made it quite clear that they wanted us to believe that they would not make any serious settlement offer until well into the trial, and further that they would use any tactic, including illegitimate ones, to make this case more expensive and prolonged.

5. I provide the following responses to Mr. Kaminsky's and Dodyk's allegations:

a. Mr. Kaminsky fails to inform the Court that defendants made it quite clear to plaintiffs at the October 1994 mediation and subsequently that defendants were negotiating in bad faith by lying to plaintiffs about Mr. Grosfeld's assets and by "increasing" their settlement offer from $3.0 million to only $3.1 million after plaintiffs reduced their demand from $120 million to $90 million;

b. Contrary Mr. Dodyk's repeated statements, plaintiffs did not insist on $90 million in cash throughout trial up to the evening of January 26, 1997;

c. Neither I nor anyone else on plaintiffs' side breached the Stipulation of Settlement regarding initiating contacts with the media;

d. Plaintiffs expected during the settlement negotiations for there to be far more claims filed than will apparently be the case, in part because of the size of the average claim, the profile of class members, the Stipulation's provisions for efforts to locate class members, and because of the number of claims filed in the MOI Receivership.

Background of Settlement Negotiations

6. I first spoke with Mr. Kaminsky sometime after the September 1994 deposition of Grosfeld, and not in early 1994 as Mr. Kaminsky claims in his declaration. Prior to that time defendants had never made a settlement offer or indicated that they would be interested in hearing a serious offer from plaintiffs' counsel. We tried repeatedly to engage defendants in settlement discussions, including writing a letter to Mr. Wasinger prior to the time that the Court decided our motion for partial summary adjudication of the boiler room claim. Defendants declined to engage in settlement discussions. The explanation that I heard from Mr. Wasinger after the class was certified was that this case would have to be tried, because it was only in the trial context that the Court would understand that the case could not proceed as a class action.

7. Mr. Kaminsky's declaration fails to disclose highly relevant events of what happened in the October 18-19, 1994 mediation. Specifically, Mr. Grosfeld and his counsel took absurd and bad faith positions at the mediation. Plaintiffs, without knowing Mr. Grosfeld's assets, first demanded $120 million which was basically the amount of the classes' losses, without the over $130 million of statutory pre-judgment interest that had already accumulated on these losses. Defendants came back with an offer of $3 million.

8. Plaintiffs then informed the mediator that they could go no further without Grosfeld disclosing his net worth and his assets. We had previously made it clear to Mr. Grosfeld's counsel that we wanted to know his assets before making a formal demand at the mediation. Prior to that time Mr. Grosfeld had declined to provide us with that information. The Court had already ruled that we were entitled to know this information in connection with plaintiffs' punitive damages claim. During the mediation, the Court ordered Mr. Grosfeld to disclose to us the amount of his assets so that we could use this information in connection with negotiating at the mediation.

9. Mr. Grosfeld then disclosed that he had a net worth of $85 million. Plaintiffs believed that he had considerably more based on our own investigations. It turned out after the mediation that in fact he had fraudulently transferred to his wife some $100 million in assets. Mr. Grosfeld also attempted to mislead us on the tax consequences to him of a settlement.

10. In any event, after Mr. Grosfeld made his initial offer of $3 million, we reduced our demand by $30 million to $90 million with the explicit statement that we would reduce our offer "substantially" more if defendants made a good faith counter above their $3 million offer.

11. Mr. Kaminsky then said that he was "increasing" his $3 million offer to $3.1 million. Mr. Kaminsky further said he would not make a serious counter-offer until we actually lowered our settlement demand again. (There was never any discussion whether the $3.1 million settlement would be conditioned on a reversion or that it would be entirely in cash).

12. The mediation thus ended with defendants making it clear to us that they wanted us to bargain against ourselves and that they were not in the least bit interested in paying anything significantly over $3.1 million.

13. Defendants' position was clearly neither reasonable nor logical, since Mr. Kaminsky noted at the mediation, and in front of plaintiffs' counsel and the mediator, that Mr. Grosfeld's exposure was enormous. Mr. Kaminsky told plaintiffs' counsel and the mediator that if class-wide damage and liability questions were going to the jury, then "Mr. Grosfeld's life was over." And it was clear that an offer of $3.1 million was not even a "nuisance value" offer since the case would cost considerably more than that to try. Given that the Court had already certified a class and granted summary judgment in plaintiffs' favor on the boiler room claim, there was no way to view defendants' "offer" as anything other than a bad-faith insult. Mr. Kaminsky then

made it clear to the mediator and to us that before any serious settlements could occur the Court would have to decide defendants' recently filed motions in limine to preclude the jury from hearing class wide damages and liability issues and critical evidence such as the "Isakow Report." Mr. Kaminsky also stated that if defendants were unsuccessful on the class wide damage and liability motions, defendants would have to petition the Eleventh Circuit for a writ of mandamus.

14. Mr. Kaminsky and I happened to take the same plane to New York the evening after the mediation ended and spoke further. Mr. Kaminsky noted that Mr. Grosfeld understood that there was a significant chance that he could lose the case and that the damages would potentially be in the hundreds of millions of dollars. I pointed out that with his own analysis, that defendants' $3.1 million offer could only be construed as absurd and insulting. Mr. Kaminsky explained that the problem with settling now was with potential damages that high, Mr. Grosfeld was paralyzed and could not make a reasonable offer. Mr. Kaminsky said that although it might seem ironic, settlement might only become possible if defendants were successful in precluding the jury from deciding the class-wide liability and damage issues. Mr. Kaminsky said that he also knew that his settlement position could not, and would not, result in a settlement, but that it was all that he could do.

15. Mr. Kaminsky also on this plane ride picked up Mr. Wasinger's theme that it was probable that this case would have to go to trial. I told Mr. Kaminsky that I would not be surprised at this result for two reasons. We had indications

in the documents produced by defendants and from other sources that Mr. Grosfeld's negotiating style often involved keeping his options open until the very last second. (I had previously discussed this point with Larry Bonner as a reason why I thought Mr. Grosfeld intended to try this case irrespective of any reasonable settlement demands plaintiffs made.) It was also obvious to us that Mr. Grosfeld independently had economic incentive to litigate rather than to settle since his assets were generating more than enough income to pay his attorneys fees. Thus it made more economic sense for him to pay litigation expenses instead of funding a settlement before he absolutely had to. And by this time discovery was closed, and the Court during the October 1994 mediation had continued the trial date.

16. The next significant event was a pre-trial conference in January, 1995. The Court had assigned to the Special Master the task of recommending a ruling on defendants' motions in limine to preclude class wide liability and damage verdicts. At that hearing before the Special Master, Mr. Berger suggested that the parties engage in a blind exchange of settlement numbers that would be disclosed to the other side only if the numbers crossed or if they fell within a pre-agreed range of each other. Mr. Berger said he was not pushing settlement, but that he had found this technique to work in other cases where the parties were divided and unwilling to make the first move. Mr. Berger even graciously offered to have his secretary serve as the exchange middle-person. I agreed to this procedure on behalf of plaintiffs. Mr. Wasinger flatly rejected this offer and said defendants would go back to the mediator if and when settlement became an option.

17. The Special Master ultimately recommended denying defendants' "in limine" motions, and the Court then took the matter under submission. As indicated above, the Court had vacated the trial date and continued the trial for approximately one year. Plaintiffs were clearly disappointed by the magnitude of this delay. I therefore suggested to Mr. Kaminsky that plaintiffs would soften in their position given the delay factor and inquired whether he was interested in resuming settlement negotiations before plaintiffs again began in the fall of 1995 to prepare for trial. I received no response at all to this suggestion.

18. The Court on January 17, 1996 basically affirmed the Special Master's R&R. The Court also set a trial date for that Spring. Mr. Grosfeld then unsuccessfully sought the writ of mandamus from the 11th Circuit, as Mr. Kaminsky had promised he would. Shortly after defendants filed the petition for the writ, the Court vacated the Spring 1996 trial date and continued the trial until September 1996.

19. Throughout 1995 and 1996 I attempted to elicit from Mr. Kaminsky a good faith response to our $90 million demand. Throughout this period plaintiffs' case was appearing stronger. But I nonetheless did not increase the $90 million mediation demand, even though: (1) plaintiffs discovered that Mr. Grosfeld had lied about his assets at the mediation and we had discovered that he had $100 million more in his and his wife's joint name than he had disclosed when we made the $90 million demand; (2) the Court in 1995 issued factual findings that Grosfeld had fraudulent conveyed assets to his wife and that plaintiffs had a "substantial likelihood of success" on the merits of the Boiler

Room Claim at least; (3) the Court ruled that the jury would decide class-wide damages and liability - a decision that Mr. Kaminsky said would be the "end of Mr. Grosfeld's life"; (4) defendants were unsuccessful with their writ petition to the 11th Circuit, a petition on which Mr. Kaminsky said he was putting a lot of hope; and (5) defendants' motion in limine to preclude important evidence including the "Isakow Report" was unsuccessful. Plaintiffs were therefore going to trial on our core claims, the Florida Boiler Room, the CEA claim, and the RICO claim, and interest was mounting.

20. Mr. Kaminsky during this period made inconsistent statements regarding settlement. For instance, notwithstanding that Mr. Kaminsky sometimes admitted to me that there was strong plaintiffs' evidence, he said on another occasion that there was "not much" to plaintiffs' case. On one occasion he conceded that the case would likely go to trial because Mr. Grosfeld could not negotiate from a position of weakness and that Mr. Grosfeld did like to keep his options open to the last second. During the summer of 1996 Mr. Kaminsky raised the issue of settlement on his own for the first time since the October 1994 mediation. He told me that the case "should settle", but that Mr. Grosfeld would not pay "hundreds of millions of dollars" to settle the case. I reminded Mr. Kaminsky that our demand was still $90 million, not hundreds of millions of dollars. Mr. Kaminsky, however, was still unwilling to raise the $3.1 million offer unless plaintiffs would first bid against themselves by lowering our demand. I told Mr. Kaminsky then, and on an additional occasion that summer, that plaintiffs were willing to negotiate in good-faith, but that Mr. Grosfeld would have to put a sum of money on the table that showed he was serious about settlement and that he recognized he faced

significant exposure. Notwithstanding this, Mr. Kaminsky never budged. Irrespective of Mr. Kaminsky's various comments, two things were quite clear. First, Mr. Grosfeld was not sufficiently interested in knowing our bottom line to make a good faith offer above his October 1994 $3.1 million figure. Second, it would therefore have been extremely unwise for me to suggest to Mr. Grosfeld that we would bargain against ourselves while Mr. Grosfeld stayed at $3.1 million.

21. I should also note that throughout this period prior to the September 1996 pre-trial, Mr. Kaminsky had conceded from time to time that Mr. Wasinger's overly aggressive and contentious tactics were responsible for much of the unnecessary litigation activity in the matter. Mr. Kaminsky also told me that he was working with Mr. Wasinger to try to get him and the "Honigman" firm to be more cooperative. He said, however, that there was a limit to what he could do because he did not know as much as the Honigman firm about many of the detail of the case. He then told me in 1996 that he was acquiring a bigger say in the case and that we would see a change in defendants' tactics and level of cooperation.

22. Nothing ever changed of course, and it had become clear when Mr. Kaminsky first became involved that Mr. Kaminsky was running his own Mutt and Jeff routine, always pointing the finger to Mr. Wasinger as being the problem - the zealot - but making sure that defendants' litigation tactics remained as overly truculent and vexatious as possible.

23. As I indicated above, it also became clear that Mr. Grosfeld never intended to make any reasonable settlement

offer until he was actually in trial, and that he would attempt to put off that trial and any serious negotiations for as long as possible. Indeed, he tried to put off the September 1996 trial at the last minute by complaining about his back problems and filing another motion for reconsideration and certification for appeal of the January 17, 1996 class wide order. It therefore became clear to plaintiffs that the only chance to settle this matter reasonably was for Mr. Grosfeld to understand that we would not bargain against ourselves, and that we were enthusiastic to have the jury decide the issues. Had we responded any differently to Mr. Grosfeld and his counsel's tactics, it would have made settlement negotiations that much more difficult when he finally did decide it was time for him to discuss settlement seriously. Mr. Grosfeld, in short, left plaintiffs' counsel no alternative but to wait for him to move and to respond to his counsel's tactics.

24. During the pre-trial it was not I who first approached Mr. Kaminsky, contrary to Mr. Kaminsky's declaration. Mr. Bonner suggested in a jocular fashion that the parties should discuss settlement again. I then told Mr. Kaminsky about my exchange with Mr. Bonner and that if defendants were serious, we would be pleased to talk about settlement but that it was up to defendants to indicate that they would negotiate in good faith by offering more than $3.1 million. At that point I never indicated that we were still at $90 million, again contrary to Mr. Kaminsky's declaration.

25. After considering the matter, Mr. Kaminsky said that we should call Mr. Dodyk if we were interested in pursuing settlement. This was the first time we had heard of Mr.

Dodyk's involvement. Mr. Kaminsky said the Mr. Dodyk was familiar with the case and had authority to negotiate on Mr. Grosfeld's behalf. Mr. Kaminsky also suggested that I stay out of the negotiations on plaintiffs' behalf and instead get someone from our firm with less history in the case involved for settlement purposes. It was then that I had Mr. Anderson call Mr. Dodyk. None of this happened, however, until the case was already going to trial. Because Mr. Anderson was a member of the trial team, he had to quickly bow out of the negotiations at which time Mr. Cooper became involved. It was during Mr. Anderson's initial discussions with Mr. Dodyk that defendants raised for the first time the possibility of an offer containing a non-cash component. It is clear therefore that defendants' strategy all along was to stonewall until it was crystal clear that the case was going to a jury.

26. I will also add here that defendants' offers were completely unacceptable until the $40 million offer made the night before closing argument. Prior offers were below that amount by in excess of $10 million. This further confirmed that Mr. Grosfeld was always holding out to the last moment to see if we would blink.

Response to Defendants' Claimed Breaches of the Settlement Stipulation

27. Mr. Dodyk's claims that the differences between his and plaintiffs' counsel's interpretations of the Stipulation of Settlement amount to plaintiffs' breaches of the Stipulation. I will not address those allegations since they are clearly not violations, as the Court has so found.

Appendix H

28. I will address one allegation in ¶10 of Mr. Dodyk's declaration - that I breached the stipulation's proscription against initiating contact with the media. Mr. Dodyk's allegations are completely untrue. As also discussed in Mr. Cooper's declaration, I picked up a telephone message on January 31, 1997 from an AP reporter, Catherine Wilson. I was about to board a plane at the Miami airport after the hearing, and listened to this message: "Hi, Cathy Wilson calling from Associated Press. I was calling for a comment on the MultiVest settlement agreement. I'm in Miami, 305/ 594-5825. Thank you." (I still have a tape of the phone mail message). I returned the phone call and Ms. Wilson told me that she heard about the settlement from an AP stringer or reporter who was in the Courthouse that morning. She asked me questions and I answered them.

29. I spoke with defendants' counsel after the AP article appeared (I believe either Mr. Dodyk or Mr. Bonner) when he raised questions about the article and gave him Ms. Wilson's number and explained the above facts.

30. Sometime during the following two weeks I heard from Ms. Wilson that Mr. Bonner and Mr. Kaminsky had both interviewed her in person at their offices. I understand from Ms. Wilson that she confirmed precisely what I have testified to above.

31. I also had a telephone conference with Mr. Cooper and Mr. Dodyk, as accurately described in Mr. Cooper's declaration submitted herewith.

Appendix H

Plaintiffs' View of the Number of Claims To Be Filed:

32. Plaintiffs have already informed the Court that we were surprised by the rate at which class members are filing claims, according to recent reports of Mr. Buchband, the Settlement Administrator. Plaintiffs felt that the rate would be higher Indeed, the experience of the MOI Receiver suggested that class members would be far more interested in filing claims. The Receiver informed us that when he sent out notices only to those class members who had purchased ETOs within the last two years of MOI's existence, he received close to 3000 claim forms totaling close to $30,000,000 in claims. The Receiver had under $300,000 to distribute.

33. In contrast, we were contacting all 20,000 members from all 5 years of MOI's existence in the ETO market, and informing them that there was a $40 million fund, and that they could expect to receive some 20% of their losses. Given the average MOI ETO customer loss of $6000, this amounted to an average $1200 recovery per each class member for simply filing the claim.

34. In addition, the Settlement Stipulation and modern address location methods assured us that we would be locating the vast majority of all class members, thereby increasing further the number of class members that we expected to file claims. I do note here that defendants fought our efforts to have the settlement administrator resend the notices that had been returned by using a credit bureau search service. I also believed when I agreed to settle the case, and I believe now, that it would have been even more difficult to

locate class members and get them to return claim forms had the litigation continued through more years of appeals.

I declare under penalty of perjury that the forgoing is true and correct and that I could so competently testify if called upon to do so.

Executed at San Francisco, California, this 5th day of May, 1997

s/ Neil A Goteiner
Neil A Goteiner

APPENDIX I — DECLARATION OF JOHN L. COOPER IN RESPONSE TO APRIL 24, 1997 DECLARATION OF PAUL M. DODYK DATED MAY 5, 1997 AND FILED MAY 6, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-6863-
CIV-UNGARO-BENAGES

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants.

DECLARATION OF JOHN L. COOPER IN RESPONSE TO APRIL 24, 1997 DECLARATION OF PAUL M. DODYK

I, John L. Cooper declare as follows:

1. I am a member of the law firm of Farella, Braun and Martel, LLP. I am licensed to practice law in the State of California.

Appendix I

2. I submit this declaration to respond to certain statements in Paul Dodyk's April 24, 1997 declaration.

3. Much of Mr. Dodyk's declaration relates settlement discussions that were privileged pursuant to Rule 408 of the Federal Rules of Evidence, were off the record, irrelevant, and are improper to bring before this Court's attention even if they were accurately described, which they are not.

4. Mr. Dodyk swears twice that plaintiffs' counsel was adamantly insisting on $90 million in cash up until the evening of January 26, 1997 when we first reached agreement on the amount of the settlement fund (Dodyk Declaration ¶¶ 6 and 27). This is untrue. I refer the Court to Mr. Goteiner's declaration for a description of plaintiffs' settlement position prior to September 1996 when I became involved with Mr. Dodyk in settlement negotiations. By the time of my involvement, Mr. Anderson of plaintiffs' trial team had already had several conversations with Mr. Dodyk regarding a possible approach toward settlement which involved a combination of cash and other consideration. I was brought into the negotiations at that point. During my first conversation with Mr. Dodyk, he suggested that we explore the idea of a settlement which included warrants on stock held by Mr. Grosfeld as well as a cash payment. I agreed on behalf of plaintiffs to consider and evaluate Mr. Dodyk's first suggestion that the settlement fund be some mixture of cash and warrants on stocks, as long as the class would be fully protected and secured to the extent that warrants were part of the settlement fund. Over the course of September and October, 1996, Mr. Dodyk informed me that he and Mr. Grosfeld had decided that warrants would not work, and they

then suggested that plaintiffs consider a mixture of cash and promissory notes or deferred obligations secured by a letter of credit. We agreed to evaluate and negotiate regarding that approach and as a result made it clear that we were not demanding an all cash settlement.

5. In none of these settlement discussions did I once say, or even suggest to Mr. Dodyk, that plaintiffs were insisting on $90 million. For most of this period of settlement discussions, all of my focus and that of my partner, Jeff Newman, was on negotiating and drafting the Settlement of Stipulation and the underlying documents which specifically provided that no more than 25% of any settlement payment would be in cash. We did not discuss the amount of the settlement fund with Mr. Dodyk until after we had resolved the settlement documents. The idea was that we wanted to have binding documents in place in the event the parties could agree on a number; we did not want to exchange numbers, only to have the settlement then break down in a dispute over terms of payment, security, or other issues. We thought this approach of having executed documents prior to exchanging settlement numbers critical to protect the class and to end the litigation at a fair and reasonable settlement amount. We believed, based on defendants' prior settlement strategy, as discussed more fully in Mr. Goteiner's declaration, that defendants would misuse predictable debates over settlement terms. When I came into the negotiations there was a very low level of trust between the opposing parties which made the negotiations difficult. Thus, it was not until the last weeks prior to the evening of January 26, after we had the completed and fully executed settlement documents, that we began to try to reach a mutually acceptable settlement amount.

6. During the September-January period we negotiated virtually every paragraph of the settlement papers. It was only because of those negotiations and drafting efforts that we were eventually able to exchange numbers (wherein we ultimately reached agreement as to the $40 million on January 26) and to present the completed settlement papers to the Court the following day. The draft documents which were exchanged between the parties during this period make clear that beginning in September 1996, the parties were negotiating on a combination of cash and warrants or promissory notes or deferred obligations.

7. Mr. Dodyk also swears that the: ". . . clear sailing provision in this Stipulation was presented to me by plaintiffs' counsel as a nonnegotiable demand. I had no alternative but to accept it if there was to be any prospect of settlement." (¶21; see also ¶23). This is untrue in several respects. First as I mentioned above, every paragraph of these settlement papers were negotiated at arms length, and often repeatedly revisited and modified. I never told Mr. Dodyk that defendants' non-objection to our fee and costs request was non-negotiable or a deal-breaker. I told him, that this provision was important to plaintiffs to end this lengthy and bitter litigation because we expected that without it that Mr. Grosfeld would attempt to continue the litigation or dispute any fee award for years to come. We were not concerned about judicial scrutiny of our fee request or the fees awarded. We knew that the Court, having presided over the litigation for four years and having conducted a five-month trial, had a more than adequate basis on which to evaluate our fee request. We were, however, concerned about Mr. Grosfeld, as opposed to class members, prolonging the litigation by

frivolous objections to our fee request. Because Grosfeld was to have a reversionary interest in the settlement fund, we wanted him to acknowledge a percentage of the final settlement fund to be paid as fees and thus end the hostilities once and for all. The purpose of the settlement was to bring about peace, not merely to change the nature of future disputes.

8. The negotiations on this issue were that I informed Mr. Dodyk that we would *limit* our fee request to 1/3 of the as yet to be agreed settlement fund and requested that the defendants not object to such a fee request plus payment of expenses; defendants had the right to object if we sought any fee more than 1/3 of the fund. Presumably this fee ceiling was important to Mr. Grosfeld since Mr. Dodyk informed me that Mr. Grosfeld and he were expecting a reversion. To the extent our fee was higher, the reversion to Mr. Grosfeld would be smaller. Therefore it was important for Mr. Grosfeld to know what his likely reversion would be under various scenarios so that he could then better estimate the upper limit of his exposure.

9. Mr. Dodyk responded to my request by agreeing that the defendants would not object to our fee request of 1/3 of the settlement fund plus costs and expenses.

10. Plaintiffs agreed to this 1/3 ceiling on our request for fees knowing that prevailing 11th Circuit law supported an award of 1/3 of the settlement fund as fees (or an even higher percentage depending on the circumstances). Indeed, the *Camden I* decision noted that 20% to 30% of the settlement fund is the norm, with 50% being the upper limit.

Appendix I

It is the extraordinary case, such as the one at bar, that ever goes to trial, let alone lasts 7 years with a five-month jury trial. This Court cited that law in making its fee award on March 31, 1997. We were also aware at the time that we negotiated the 1/3 fee ceiling that, depending on the course of trial and the Court's rulings (particularly on jury instructions and special interrogatories) that we risked a fee award that could be less than our lodestar. We were also fully aware at the time that in any event the Court would be fully aware of this agreement and would, on its own, ask all the questions it had about our fees, that the Court had been through fee petitions before, and that the Court was very familiar with this case for purposes of making fair and reasonable fee rulings. We also expected that class members would not shrink from raising objections to our fees if they had any. Finally, we agreed in the settlement documents that if class members objected to our fees or appealed from our fee award, that fact would not prevent the settlement itself from going forward for the class. Thus, class members were fully protected, defendants had certainty concerning the upper limits of their exposure and the parties moved toward an end to the hostilities. We subsequently agreed with the Court to waive any appeal with respect to the Court's decision on the portion of any fee award to be paid in cash as opposed to other obligations. We believed, therefore, that the Court had before it all of the relevant facts, and ample flexibility to decide the fee award independent of the reasonableness of the settlement.

11. Defendants have raised several points about the reversion provision in the Stipulation of Settlement. Plaintiffs agreed to the reversion provision for several reasons. First,

Mr. Dodyk insisted on it. Second, Mr. Dodyk made it quite clear that with the reversion, Mr. Grosfeld would increase his offer to the class above what he would otherwise offer. Third, plaintiffs were agreeable to the reversion because it would increase the size of the settlement fund to the class, thus creating a larger award for claiming class members. As Mr. Goteiner points out in his declaration, we thought that the relatively large average award per customer resulting from the $40 million settlement fund would generate motivation for most class members to file claims.

12. During the settlement conference on January 28, 1997 in the Court's chambers, Mr. Dodyk spoke favorably about the size of the settlement fund and how it compared favorably with both the NERA study and the study of settlements with which Mr. Dodyk's firm had been involved. At that point, Mr. Dodyk and his clients had agreed to the reversion feature in the signed settlement agreement and Mr. Dodyk had received a letter from Mr. Buchband stating that Mr. Buchband expected approximately one third of the class to claim. (As we have previously informed the Court, plaintiffs did not see Mr. Buchband's estimate until after the January 31 preliminary approval conference and defendants had submitted it to the Court). Yet Mr. Dodyk did not suggest in chambers on January 28 that the Court should consider the number of claims filed in evaluating either the fairness and reasonableness of the $40 million settlement fund or the relationship of plaintiffs' requested fees to the amount that Mr. Dodyk expected at that time would ultimately be distributed to the class. Mr. Dodyk endorsed the settlement on these terms to the Court.

13. Mr. Dodyk claims that plaintiffs counsel breached the Stipulation of Settlement in several ways (Dodyk Declaration ¶¶8-16). I will confine my declaration here to responding to the inaccurate accusation that we breached §6.1 of the stipulation that prevented plaintiffs from initiating communication with the class (Dodyk ¶10).

14. The Stipulation specified that plaintiffs were not to initiate any contact with the media, but it allowed plaintiffs' counsel to respond to questions raised by the media as long as the contact with the media is not initiated by plaintiffs' counsel. I specifically negotiated this provision with Mr. Dodyk, and declined to agree on behalf of plaintiffs to a gag order preventing plaintiffs' counsel from responding to inquiries made to them by the media.

15. As Mr. Goteiner states in his accompanying declaration, during the afternoon of January 31, Catherine Wilson, an Associated Press reporter, called Mr. Goteiner and left a message on his office phone mail in San Francisco asking him to call her to give her a comment about the settlement. Mr. Goteiner picked up the message from his phone mail in the Miami airport as we were waiting to board the plane to return to San Francisco. Mr. Goteiner returned the call from the phone booth in the airport.

16. The AP story then appeared which prompted Mr. Dodyk's call to me wherein he expressed his concern that we had violated the terms of the Stipulation. I had several telephone calls with Mr. Dodyk on this subject and had Mr. Goteiner participate in one of those calls. Mr. Goteiner related to Mr. Dodyk directly what had happened, specifically

that Ms. Wilson had initiated the phone call to him because an AP representative in the Courthouse had heard about the settlement. Mr. Goteiner offered to provide a sworn declaration to Mr. Dodyk as to what happened. I also related to Mr. Dodyk the recorded phone mail message from Ms. Wilson to Mr. Goteiner asking that Mr. Goteiner call her.

17. After Mr. Dodyk considered these facts, I am informed that he had Mr. Kaminsky and Mr. Bonner interview Ms. Wilson in Ms. Wilson's office. Mr. Dodyk later told me that he was satisfied that Mr. Goteiner had not violated the Stipulation in that he had not initiated the contact with Ms. Wilson. Because of this exchange, I was very surprised to read ¶ 10 of Mr. Dodyk's affidavit that as a result of Ms. Wilson's call to Mr. Goteiner that defendants "were confronted with a breach of 6.1 of the Stipulation . . ."

I declare under penalty of perjury that the foregoing is true and correct and that I could so competently testify if called upon to do so.

Executed at San Francisco, California, this 5th day of May, 1997.

s/ John Cooper
John Cooper

APPENDIX J — ADMINISTRATIVE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA CLOSING CASE DATED AND FILED MAY 8, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-6863-CIV-UNGARO-BENAGES

WILLIAM WATERS, LINDA BARTHOLOMEW, et al,

Plaintiffs,

vs.

INTERNATIONAL PRECIOUS METALS CORP., INC., et al.,

Defendants.

ADMINISTRATIVE ORDER CLOSING CASE

THIS CAUSE is before the Court upon a *sua sponte* examination of the file. It is hereby

ORDERED AND ADJUDGED that this case is CLOSED for administrative purposes. It is further

ORDERED AND ADJUDGED that all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of May, 1997.

s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

APPENDIX K — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RE MOTIONS DATED AND FILED NOVEMBER 4, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-5074

WILLIAM WATERS; LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

versus

INTERNATIONAL PRECIOUS METALS CORPORATION; MULTIVEST INCORPORATED; *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: CARNES and HULL, Circuit Judges.

BY THE COURT:

Appellees' motion to strike Appellants' corrected brief dated October 13, 1998 and filed October 14, 1998 is GRANTED. This court, however, accepts Appellants' second corrected brief dated October 16, 1998.

Appellees' motion to withdraw its motion to clarify this court's October 6, 1998 order is GRANTED.

Appendix K

Appellees' motion for sanctions filed October 15, 1998 is DENIED. The Court reserves the right to impose sanctions on counsel for both sides should their conduct in the future not be more professional than it has been to this date.

Appellees' motion to supplement the record on appeal is CARRIED WITH THE CASE.

The motion filed by the American Association of Retired Persons ("AARP") for leave to file a brief as *amicus curiae* is GRANTED, PROVIDED all references in the brief to the survey attached as an addendum are deleted and a new brief devoid of those references is filed within seven days of the date of this order. No additional material should be added nor should any other changes be made in that brief.

AARP's motion for leave to file an addendum to its *amicus* brief is DENIED, because the survey is non-record material not presented in the district court. *See also Davis v. Monroe County Bd. of Education*, 120 F.3d 1390, 1410 (11th Cir. 1997) (Carnes, J., concurring) ("In general, we should be reluctant to incorporate into our reasoning the results of a survey that has not been examined critically or tested in a trial or evidentiary hearing, the time-honored and proven methods our system of justice uses to determine material facts."), *cert. granted*, 1998 WL 663332 (Sept. 29, 1998).

APPENDIX L — BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF APPELLEES DATED NOVEMBER 4, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5074

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, INDIVIDUALLY AND AS TRUSTEE OF THE JASON GROSFELD TRUST, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., AND THE CYPRESS GROUP, INC.,

Appellants,

v.

WILLIAM WATERS AND LINDA BARTHOLOMEW, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF APPELLEES

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Attorney for *Amicus Curiae*
American Association of Retired Persons

Appendix L

CERTIFICATE OF INTERESTED PERSONS

In accordance with F.R.A.P. 28 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-2(b), undersigned counsel for *Amicus Curiae* American Association of Retired Persons states that the following are interested persons and entities:

1. American Association of Retired Persons — *Amicus Curiae*

2. Gary S. Anderson — Counsel for Appellees/ Plaintiffs

3. Linda Bartholomew — Appellee/Plaintiff, Class Representative

4. R. Lawrence Bonner — Counsel for Appellants/ Defendants

5. Victor F. Caldwell — Counsel for Appellants/ Defendants

6. Justin Y.K. Chu — Counsel for Appellants/ Defendants

7. Certified Class of MultiVest Options, Inc. Customers — Appellees/Plaintiffs

8. John L. Cooper — Counsel for Appellees/Plaintiffs

9. Copart, Inc.

10. Cravath, Swaine & Moore — Counsel for Appellants/ Defendants

11. The Cypress Group, Inc. — Appellant/Defendant

12. Paul M. Dodyk — Counsel for Appellants/ Defendants

13. Farella Braun & Martel LLP — Counsel for Appellees/Plaintiffs

14. Neil A. Goteiner — Counsel for Appellees/Plaintiffs

15. James Grosfeld, individually and as Trustee of the Jason Grosfeld Trust — Appellant/Defendant

16. Nancy Grosfeld — Defendant in Conveyance Litigation below

17. Homer & Bonner, P.A. — Counsel for Appellants/ Defendants

18. Honigman, Miller, Schwarz & Cohn — Counsel for Corporate Defendants below

19. International Precious Metals Corporation — Appellant/Defendant

20. Robert M. Jackson — Counsel for Corporate Defendants below

21. Martin I. Kaminsky — Counsel for Appellants/ Defendants

22. Karen P. Kimmey — Counsel for Appellees/ Plaintiffs

23. Jeffrey R. Knight — Counsel for Appellants/ Defendants

24. Eric G. Lipoff — Counsel for Appellees/Plaintiffs

25. James J. Mangan — Counsel for Appellants/ Defendants

26. Edward T. McDermott — Counsel for Appellants/ Defendants

27. MultiVest, Inc. — Appellant/Defendant

28. MultiVest Real Estate, Inc. — Appellant/Defendant

29. Jeffrey P. Newman — Counsel for Appellees/ Plaintiffs

30. Pollack & Kaminsky — Counsel for Appellants/ Defendants

31. L. Louis Raring — Counsel for Appellees/Plaintiffs

32. Raring & Lipoff — Counsel for Appellees/Plaintiffs

33. Ronald B. Ravikoff — Local Counsel for Plaintiffs below

34. S.S. Melbourne, Inc. — Appellant/Defendant

35. Michael R. Siebecker — Counsel for Appellants/ Defendants

36. The Honorable Ursula Ungaro-Benages — Trial Judge below

37. Steven C. Wasinger — Counsel for Corporate Defendants below

38. William Waters — Appellee/Plaintiff, Class Representative

39. C. Brandon Wisoff — Counsel for Appellees/ Plaintiffs

40. Deborah M. Zuckerman — Attorney for *Amicus Curiae* American Association of Retired Persons

41. Zuckerman, Spaeder, Taylor & Evans — Local Counsel for Plaintiffs below.

CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to the provisions of Title 29 of Chapter 6 of the District of Columbia Code.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed in 14 Point Times New Roman font.

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STATEMENT OF INTEREST

The American Association of Retired Persons (AARP) is a non-profit membership organization dedicated to addressing the needs and interests of people 50 and older. Approximately 2.26 million of AARP's more than 30 million members live in Florida, with 770,000 in Georgia, and 378,000 in Alabama. As the largest membership organization serving older Americans, AARP is greatly concerned about the rampant fraud targeted against them through use of the telephone. Congress has estimated that fraudulent telemarketing costs consumers $40 billion annually, and research and law enforcement investigations indicate that scams specifically target older people.

AARP thus has made attacking this problem a top priority. AARP supports enactment and vigorous enforcement of federal and state laws and regulations designed to outlaw fraudulent and deceptive telemarketing sales and to provide adequate remedies for victims. Because research shows that consumers have great difficulty distinguishing between fraudulent and legitimate pitches, AARP undertook a major initiative to educate consumers about how to avoid telemarketing scams, and how to enforce their rights when they have been defrauded. This campaign is designed to counter victims' perception that fraudulent telemarketing is not a criminal activity.

In addition, AARP has been an active partner with state and federal law enforcement and consumer protection agencies, supporting the investigation and prosecution of fraudulent telemarketers. For example, in 1995, AARP

members became undercover witnesses for the FBI and attorneys general, tape recording conversations with suspected fraudulent telemarketers. The recordings became the foundation for "Operation Senior Sentinel" prosecutions, as they revealed the actual misrepresentations and deceptive pitches made to convince consumers to make purchases or otherwise send money.

Consumer education and prosecutions are inadequate, by themselves, to protect telemarketing fraud victims. Private litigation, particularly class actions, is a necessary complement to these other activities and, in fact, hold more promise of providing relief for victims. AARP is filing this *amicus* brief due to its concern that this critical avenue of redress will be severely limited if Appellants succeed in undoing a negotiated settlement that created a common fund and provided for attorneys' fees as a percentage of the total fund.

STATEMENT OF ISSUES

1. Did the district court err in basing counsel's fee on the total settlement fund, where to do otherwise would violate Supreme Court precedent and limit the ability of telemarketing fraud victims to retain attorneys qualified to file class actions challenging hard-to-prove schemes involving numerous deceptive transactions?

2. Did counsel confer a substantial benefit on the class of victims of a telemarketing commodities scheme by creating a settlement fund of $40 million which produced, after the lower court awarded attorneys' fees and expenses,

a recovery of 20% of each victim's loss (an average of $1,200 per victim)?

3. Should this Court reform a settlement agreement to rescind that part of the agreement in which defendants expressly agreed not to object to counsel's fees, where such action would discourage class action settlements and make counsel reluctant to represent a class of telemarketing fraud victims?

SUMMARY OF ARGUMENT

Numerous legislators, law enforcement officials, consumer advocates, and others recognize that telemarketing fraud is a serious national problem, costing an estimated $40 billion a year. Law enforcement and regulatory officials also have identified telemarketing fraud involving commodities and other investments as particularly serious. They admit, however, that federal and state resources are insufficient to attack the problem. And, even when they successfully prosecute wrongdoers, they rarely obtain restitution for victims.

Private litigation thus remains the only real option for victims. Yet, many of their individual losses are too small to justify the expenditures necessary to hire a lawyer. Class actions were intended for just these situations, and are critical in allowing victims to vindicate their rights and recover at least a portion of their losses. This avenue of redress will remain an illusion, however, unless lawyers qualified to mount a complex telemarketing fraud case can expect to receive reasonable compensation. When their efforts produce

a common fund for the class, as occurred here, the U.S. Supreme Court has held that their fees should be based on the total fund created, not merely the claims filed by class members. Appellants should not be allowed to ignore this clear precedent by avoiding the terms of a negotiated settlement regarding fees. Their actions will, if successful, permit them to benefit further from their wrongdoing and will deny their victims any realistic chance of bringing a court action to recover their losses.

ARGUMENT

I. TELEMARKETING FRAUD IS RAMPANT AND COSTLY.

A. Legislators and Prosecutors Have Focused on This Problem.

Telemarketing fraud is "one of the most pervasive forms of white-collar crime" in the United States. United States-Canada Working Group, *United States-Canada Cooperation Against Cross-Border Telemarketing Fraud*, Executive Summary (1997). Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 et seq. (1996), after finding that victims lose an estimated $40 billion a year, and that the Federal Trade Commission's resources were insufficient to protect consumers. *Id.* at §§ 6101(2), 6101(3).

Various congressional committees and subcommittees have held hearings on this issue. Describing his reaction to the briefing materials for one hearing, a Congressman stated:

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"I was stunned to learn how seemingly impervious many of these telemarketing and boiler room practices are to effective criminal prosecution. These guys are like termites. Once they are in business, you can't seem to get rid of them." *The Nature and Extent of Telemarketing Fraud and Federal And State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations*, 101st Cong. 3 (1990)[1] [hereinafter *House Hearings*] (opening statement of Rep. J. Dennis Hastert). He noted that older people often lose their life savings, and that "[v]ery rarely are these funds ever recovered, even when there is prosecution." *Id.* Another subcommittee member characterized telemarketing fraud as a "devastating crime, robbing unsuspecting victims, not only of their money but of their self-esteem and their financial independence." *Id.* at 4 (opening statement of Rep. Frank Horton).

An 84-year-old Georgia widow poignantly supported the Congressmen's observations. She lost $20,000, the entire legacy left to her by her husband and their entire life savings, in an investment scam in which she was assured she "absolutely would receive 2-1/2 times the amount of [her] investment." *Id.* at 11 (testimony of Grace L. Singletary). She also stated that she had spent many years as a schoolteacher and thought of herself as an intelligent person, but that the caller sounded like someone she could trust and his persuasive manner convinced her. She described her constant worry about "a future without any savings," and

1. Congressional findings and recommendations based on this two-day hearing are found in *The Scourge of Telemarketing Fraud: What Can Be Done Against It?*, H.R. Rep. No. 102-421 (1991).

asked the subcommittee "to stop this kind of sophisticated thievery." *Id.* at 14, 15.

The testimony is replete with examples of similar horror stories. An attorney who had helped a 90-year-old woman recover some of the money she lost to a foreign currency and precious metals scam testified that what was most incredible was that "well over $300,000 was taken from [her] in commissions." *Id.* at 43 (statement of Christopher D'Amanda).

Similar sentiment and examples surfaced at a more recent Senate hearing. Former Senator and Committee Chairman William Cohen stated:

> Telemarketing scams . . . run the gamut from small fly-by-night operators to sophisticated organized crime rings that establish boiler rooms in several cities. Whatever their size, these telephone thugs share the common motto of "reach out and scam someone," using high pressure sales tactics and slick talk to lure their victims into sending them hundreds — indeed, even thousands — of dollars.

Telescams Exposed: How Telemarketers Target The Elderly: Hearing Before the Senate Special Comm. on Aging, 104th Sess. 1 (1996) [hereinafter *Senate Hearing*] (opening statement of Sen. William Cohen). He noted that tape recordings and transcripts of calls obtained during "Senior Sentinel" revealed "how unscrupulous callers engage in what amounts to 'teleterrorism' by verbally abusing, insulting and berating senior citizens . . . ." *Id.* at 2.

Witnesses also described the techniques used to separate victims from their money. For example, a convicted telemarketer facing sentencing stated that "people . . . were hired to write elaborate pitches making promises for huge returns and the safety of the market, when in fact everyone knew that it was not an investment market that offered any legitimacy to the client." *House Hearings*, *supra*, at 74 (statement of John Albright[2]). He also stated that investment pitches are designed to fit the victim's level of sophistication: "[T]he unsophisticated investor, you would treat as if he were sophisticated so that you would talk over his head and absolutely bury him with doubletalk." *Id.* at 129.

B. Public Resources Are Inadequate to Prosecute Perpetrators.

Several witnesses from law enforcement agencies told Congress about the enormous obstacles they face in prosecuting fraudulent telemarketers, a situation that is well-known to scam artists. The interstate nature of many telemarketing scams contributes to this problem, because agencies are less apt to bring a case against an in-state operator if the victims live elsewhere. A convicted telemarketer's testimony is very telling:

> One of the things that is usually done is never to sell in your own back yard . . . . By and large, the [prosecutorial] agencies don't have the manpower or the budget requirements to deal with this and

---

2. Cooperating with the government, this witness testified under an assumed name.

> the local politicians, because there are no constituents to complain to them, are not inclined to finance these kind of investigations.

House Hearings, *supra*, at 77-78 (statement of John Albright).

The Chief of the Economic Crime Unit in the Florida State Attorney's Office stated: "it is obvious that limited resources already strained to the breaking point in areas of boiler room concentration, such as South Florida, are inadequate to deal with a problem which is nationwide in its effect." *Id.* at 163 (statement of Kent C. Neal). He also discussed the need for more money to pursue criminal enforcement, as opposed to regulation:

> career phone crooks typically welcome administrative actions and scoff at their potential sanctions. For one thing the interest of a state or federal regulatory agency reassures them that criminal charges are unlikely . . . . In addition, the time required to litigate the administrative and civil actions commonly pursued, merely buys them time to shut down, re-incorporate, and relocate their boiler rooms. It all amounts to a cost of doing business, and a small one compared to the enormous illegal profits involved.

Id. at 168.

A former Assistant U.S. Attorney who headed the southern California Fraud Task Force echoed this view:

> so many good cases where suspects should have been punished and where millions could have been recovered for victims went unindicted for lack of a few thousand dollars . . . . The lack of resources to combat scams involving *investments* has been a particular tragedy . . . . [A]s I testify today thousands of Southern California swindlers are acting with virtual impunity as they devise and carry out heartless schemes to separate elderly persons from their life savings . . . . The vast majority of the operators of these scams have never been and will never be prosecuted at all, because of a failure to commit the level of resources required to combat the problem.

Id. at 226-27 (statement of David A. Katz).

The dearth of public resources available to attack telemarketing fraud stands in stark contrast to the cost to victims, in terms of their financial, physical and emotional well-being. As discussed more fully below, class actions remain one of the only avenues of legal recourse open to them.

II. THESE CASES ARE WELL-SUITED FOR CLASS ACTIONS.

A. Class Actions Are Designed for People with Relatively Small Claims Who Would Not Otherwise Have Legal Recourse.

Consumer class actions often are the only effective way to stop wrongful business conduct and to obtain relief for

those harmed in the process. *See* National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 377-78 (1997). *See also* 1 *Newberg on Class Actions* §§ 1.06, 5.07, 5.48 (3d ed. 1992). Certain types of businesses typically deal with numerous consumers in similar ways, and many consumers are harmed by the same wrongful conduct. Yet, these businesses are essentially immune from individual damage suits because any individual recovery will be too small to justify the cost of litigation. This allows the business to profit from its wrongdoing, both financially and by not having its conduct scrutinized by the justice system. Fortunately for the consuming public, class actions "aggregate [consumers] power, enable them to take on economically-powerful institutions, and make wrongful conduct less profitable." *NACA Guidelines*, *supra*, at 377. *See also* Thomas E. Willging, et al., Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisor Committee on Civil Rules*[3] 13-14 (1996) ("even the highest level of recovery per individual class member that we found appears unlikely to support separate individual actions . . . .").

The U.S. Supreme Court has endorsed this important role of class actions:

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3. The Federal Judicial Center conducted this study in 1994-95 pursuant to a request from the Judicial Conference Advisory Committee on Civil Rules for systematic, empirical information about how Rule 23 operates. The Report presents empirical data on all class actions terminated between July 1, 1992 and June 30, 1994 in the Southern District of Florida, the Northern District of California, the Eastern District of Pennsylvania, and the Northern District of Illinois.

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> The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise . . . . The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338-39 (1980) (footnote deleted).

The Supreme Court recently reiterated this view: "While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.' " *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2246 (1997) (quoting Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497 (1969)). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

This Court recognized the class action "goal of permitting the prosecution of small claims which would not be economical to prosecute individually." *In re The Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989). Moreover,

> [b]ecause claims may be contingent or of uncertain value, potential claimants may not realize that they can recover, unless the efforts of a representative make them aware. Likewise, the effort and cost of investigating and initiating a claim may be greater than many claimants' individual stake in the outcome, discouraging the prosecution of these claims absent a class action filing procedure.

Id. (citation omitted). *See also Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968).

State courts also hold this view. For example, the California Supreme Court noted the historical and continued underpinnings of class actions, and stated that:

> Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society . . . . The alternatives of multiple litigation . . . do not sufficiently protect the consumer's rights because these devices "presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention.' "

Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964, 968 (Cal. 1971) (citations omitted).

While the losses suffered by Appellees and most other telemarketing fraud victims are significant to them, they are

small in comparison to the costs of suing for restitution. The importance of class actions in this context is particularly great, as demonstrated by congressional witnesses who cited small individual losses as a disincentive to prosecution. The Deputy Assistant Director of the FBI stated: "FBI offices . . . are inundated with complaints involving these types of frauds. Due to the limited investigative and prosecutive resources available, only those cases which involve extremely large losses to investors are able to be addressed." *House Hearings*, *supra*, at 551 (statement of Thomas Jones).

The Executive Director of the National Consumers League stated that if victims contact an agency "like the Federal Trade Commission,[4] the Securities and Exchange Commission, or Commodity Futures Trading Commission, they find those agencies usually cannot help them because their loss does not merit dedication of the agency's finite resources." *Id.* at 275-76 (statement of Linda Golodner).

These witnesses reflect the only logical conclusion that can be drawn from this commentary and testimony, namely, that private class actions remain the only realistic way for telemarketing fraud victims to seek restitution, and to ensure that bad actors cannot "retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts." *State v. Levi Strauss & Co.*, 715 P.2d 564, 571 (Cal. 1986).

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4. Federal law allows individuals to bring a civil action in federal district court to challenge a violation of the FTC's Telemarketing Sales Rule, but only when "the amount in controversy exceeds the sum or value of $50,000 in actual damages for each person adversely affected by such telemarketing." 15 U.S.C. § 6104(a).

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B. Enforcement Actions Rarely Obtain Restitution.

Successful prosecutions of fraudulent telemarketers seldom achieve any direct, i.e., monetary, benefit for victims. Congressional witnesses, including people who commit this fraud and those responsible for stopping them, expressed the problem best. For example, a convicted telemarketer stated:

> when a federal regulatory agency gets involved and shuts down a fraudulent telemarketing room, the resources that are frozen are turned over to a receiver and those assets are dissipated in total, with none of them ever being used to combat the telemarketing problem or to provide restitution to the victims.

House Hearings, *supra*, at 79 (statement of John Albright).

In response to a Congressman's question about the award of civil penalties to the government, Lawrence Fuchs, Florida's Deputy Comptroller, described the prosecution of an investment scam with losses totaling $21 million. The perpetrator pled guilty, went to prison, and also filed for bankruptcy. As a result, "the $11 million or so that we have been able to recover which would have given [victims] between a third and a half of their investment back, then went into the hands of the trustee of the bankruptcy court." *Id.* at 495. Responding to a question about potential legislation requiring asset forfeiture, William McDonald, Director of California's Department of Corporations, and Chair of the Enforcement Policy Committee of the North American Securities Administrators Association, stated:

> The difficulty . . . is that you have a body of victims out there who lost a lot of money, and if there is some money in the hands of promoters, it is awfully difficult to say we are going to seize it to put into the law enforcement side and not give any of it back to the poor victims . . . .
>
> We can get civil penalties and criminal fines, but usually there is so little cash around because it has gone offshore or been hidden, and it is usually difficult to grab any of it.

Id. at 502.

The U.S. Attorney for Nevada expressed similar sentiments:

> Telemarketing sales presentations are really [ ] carefully scripted pitches designed to trap the unwary, to close a sale by whatever means necessary. Telemarketers get paid generous commissions, living by the proposition that whatever brings profit is permissible . . . . Yet often when these con artists are brought to justice, it is impossible to recover anything to compensate their victims because most of their money has gone to purchase illegal drugs or to support an extravagant lifestyle.

Senate Hearing, *supra*, at 60 (statement of Kathryn Landreth).

While class actions thus hold great promise for making the rights of telemarketing fraud victims a reality, it will be an empty promise unless the private bar is willing to overcome the considerable odds that favor the scam artists.

III. VICTIMS NEED ACCESS TO QUALIFIED ATTORNEYS.

A. Cases Are Complex, Time-Consuming, and Difficult to Prove.

Congressional witnesses, particularly law enforcement officials, cited the nature of telemarketing fraud as yet another hurdle to successful prosecution. Of particular relevance to this appeal, the then-Chairman of the Commodity Futures Trading Commission said the following in providing supplemental information at the request of the subcommittee Chair: "criminal prosecutors have not brought a large number of cases in the futures and options fraud area . . . . [These] often involve complex legal and factual issues unfamiliar to most prosecuting attorneys." *House Hearings*, *supra*, at 791 (letter from Wendy L. Gramm).

A former U.S. Attorney who had coordinated the Southern California Fraud Task Force compared investment and telemarketing fraud to other complex white-collar crimes, noting that "complex major cases required more than one agent at a time, an agency commitment over time and a level of experience and accounting and telemarketing background that many investigators had not developed." *Id.* at 225 (testimony of David A. Katz).

Perhaps the vice-president of a small family business that lost more than $100,000 to a telemarketing fraud involving office products summed it up best:

> Prosecuting fraud cases is not an easy task. In these types of cases it boils down to he said-she said. Solid proofs are rare. The mechanics alone are a nightmare. Imagine the complexity of preparing and assembling witnesses from all over the country. When the witnesses do finally appear, the defense asks for a seven day extension and prosecution spends the next week acting as a travel agent instead of preparing the case.

Id. at 41 (statement of Orlo Ellison).

These difficulties underscore the need for committed, motivated private attorneys to step up to the plate to represent telemarketing fraud victims.

B. Attorney Fees Should Be Based on the Total Common Fund.

After describing the fraudulent telemarketing of commodities and other investments to "victims who are unsophisticated," the Director of the Enforcement Division of California's Department of Corporations stated: "[t]he last advantage of the con men is that the victims are not out enough money to afford to hire a lawyer." *Id.* at 468 (testimony of William McDonald). Class actions, however, allow the sharing of expenses, and counsel frequently advance litigation costs with the expectation they will be

reimbursed and receive reasonable fees if the suit succeeds. *See* 1 *Newberg on Class Actions* § 5.19 (3d ed. 1992).

While the "American Rule" makes parties responsible for their own attorneys' fees, regardless of the outcome of the case, *see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), courts recognize exceptions to this approach. The common fund exception at issue in this appeal was created by the U.S. Supreme Court more than a century ago, in *Trustees v. Greenough*, 105 U.S. 527 (1881), to allow an equity court to reimburse a litigant whose efforts on his own behalf created a benefit for others. This helps ensure that the high cost of litigation will not deter individual class members from pursuing meritorious cases, and prevents unjust enrichment of class members who do not play an active role in the litigation. *Id.* at 532.

The Supreme Court has extended the effect of this exception, approving the reimbursement of attorneys from a common fund. *See Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939). Reliance on these principles led to a perhaps inevitable question: how should such fees be calculated? In *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), the Supreme Court responded quite clearly, holding that counsel's fees are to be based on the entire fund, since the right of absentee class members to

> share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless

> absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs.

Id. at 480.

Boeing involved circumstances strikingly similar to this appeal (i.e., each class member had an undisputed, mathematically ascertainable claim to part of a lump sum, and class members need only prove membership in the injured class to claim that share), except that the liability and fund created here was pursuant to a negotiated settlement, rather than a court determination. This distinction does not diminish the applicability of the *Boeing* Court's affirmance of the Second Circuit's finding that "each class member had a 'present vested interest in the class recovery' and that each could collect his share of the judgment upon request. Thus . . . absentee class members had received a benefit within the meaning of the common-fund doctrine." *Id.* at 478.

This Court, noting that "every Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis," found "the percentage of the fund approach is the better reasoned . . . ." *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 773, 774 (11th Cir. 1991). Recognizing that "no hard and fast rule mandat[es] a certain percentage . . . because the amount of any fee must be determined upon the facts of each case," this Court noted that the "majority of common fund fee awards fall between 20% to 30% of the fund [and] an upper limit of 50% of the fund may be stated

as a general rule." *Id.* at 774-75. Other federal courts follow this approach, as well. For example, the Ninth Circuit found that the lower court had abused its discretion by basing a fee award on class members' claims. *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997). The Court noted that the Supreme Court has recognized the propriety of parties to a class action negotiating a settlement, as well as the payment of attorneys' fees. "The Defendants here knew, because it was in the settlement agreement, that the class attorneys would seek to recover fees based on the entire $4.5 million fund .... The Defendants had some responsibility to negotiate at the outset for a smaller settlement fund if they wished to limit fees." *Id.* at 1027. *See also Swedish Hosp. Corp. v. Shalala*, I F.3d 1261, 1269 (D.C. Cir. 1993) ("a percentage-of-the-fund approach more accurately reflects the economics of litigation practice"); and *In re Continental Illinois Secs. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("the object is to simulate the market where a direct market determination is infeasible. It is infeasible in a class action because no member of the class has a sufficient stake to drive a hard — or any — bargain with the lawyer .... [C]ounsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.").

CONCLUSION

Criminal and civil prosecutions are effective in shutting down and punishing fraudulent telemarketers. Yet, these actions are only part of the arsenal necessary to combat this widespread problem. Not only do federal and state agencies have limited resources, they also have many competing

priorities. Also, while these prosecutions may close down a fraudulent operation and result in imprisonment and the payment of civil penalties, they rarely secure restitution for victims.

This underscores the need for private lawsuits through which victims can seek redress. While some telemarketing fraud victims lose tens of thousands of dollars, many lose much smaller amounts, making it uneconomical for them to bring individual lawsuits. Class actions therefore must be available to victims and, to make this avenue of redress a reality, the prospect of an award of reasonable fees must exist to encourage competent attorneys to handle these difficult, time-consuming cases. Where counsel's efforts create a common fund for class members, these fees should be based on the total fund, not merely the claims made against the fund. To hold otherwise ignores Supreme Court precedent and will seriously affect victims' ability to enforce their rights and obtain restitution.

For all of the foregoing reasons, *amicus curiae* respectfully request that this Court reject Appellants' attempt to renege on the attorneys' fee portion of the negotiated settlement to which they agreed.

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Dated: November 4, 1998

Respectfully submitted,

s/ Deborah M. Zuckerman
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APPENDIX M — BRIEF FOR PLAINTIFFS-APPELLEES DATED OCTOBER 20, 1998, CORRECTED NOVEMBER 2, 1998

No. 97-5074

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District of Florida

BRIEF FOR PLAINTIFFS-APPELLEES

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October 20, 1998 (Corrected as of November 2, 1998.)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with F.R.A.P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 27-1, undersigned, counsel state that the following are interested persons and entities:

Gary S. Anderson (Counsel for Appellees/Plaintiffs)

Linda Bartholomew (Appellee/Plaintiff, Class Representative)

R. Lawrence Bonner (Counsel for Appellants/Defendants)

Victor F. Caldwell (Counsel for Appellants/Defendants)

Justin Y.K. Chu (Counsel for Appellants/Defendants)

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John L. Cooper (Counsel for Appellees/Plaintiffs)

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The Honorable Ursula Ungaro-Benages (Trial Judge below)

Steven C. Wasinger (Counsel for Corporate Defendants below)

William Waters (Appellee/Plaintiff, Class Representative)

C. Brandon Wisoff (Counsel for Appellees/Plaintiffs)

STATEMENT REGARDING ORAL ARGUMENT PURSUANT TO LOCAL RULE 28-2(c)

Plaintiffs believe oral argument is unnecessary.

CERTIFICATE OF TYPE SIZE AND STYLE

The text of this Brief For Plaintiffs-Appellees was typed in 11.5 point Times Roman, and the footnotes were typed in 11 point Times Roman.

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Statement Of Jurisdiction

In re Southeast Banking Corp. Secs. Litig., 51 F.3d 1003 (11th Cir. 1995) and *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), require dismissal of this appeal for lack of standing since no class member has objected to the fee and expense award or has intervened in the action. Defendants expressly and unequivocally stipulated that *they* had no objection to the fee and expense award.[1] Plaintiffs previously moved this Court for an order awarding sanctions and for summary affirmance based on a lack of jurisdiction and frivolousness. A motions panel ordered that motion "carried with the case." July 6, 1998 Order. The merits panel should decide that motion prior to entertaining defendants' appeal.[2]

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1. (R31-1371) Citations to the record on appeal are indicated as "R" followed by the volume number and docket number as listed in the Certificate of Readiness and the page number if any. Trial exhibits are designated "PX" (plaintiffs) or "DX" (defendants), followed by the page or paragraph number if any.

Plaintiffs'/Appellees' are filing concurrently with this brief a motion to supplement the record to include certain pleadings that appear on the district court docket, but were not designated by the parties prior to the preparation of the Certificate of Readiness. Citations to these pleadings are indicated by their docket entry number "DE." Plaintiffs/Appellees are also moving to include other materials attached to the accompanying motion and indicated by "PSR."

2. Citations to Defendants'/Appellants' Brief are indicated as "AB" followed by the page number. Plaintiffs are responding to defendants' October 13, 1998 Brief. The Court on October 6, 1998

(Cont'd)

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Statement Of Issues On Appeal

1. Should the Court entertain defendants' argument that they were "coerced" into their settlement and fee agreement after a five-month trial where that agreement expressly states that it is a "final and complete resolution of all disputes . . . reached voluntarily after consultation with competent legal counsel," and where defendants told the district court that a fee award of one third of the gross amount of the $40 million settlement fund, plus expenses, would be "well within the range of reasonable"?

2. Whether the district court abused its discretion in following Supreme Court and Eleventh Circuit precedent that permits class counsel's fee award to be based on the gross amount of the settlement fund, where doing so resulted in a fee and expense award representing a multiplier of less than 1.1 on class counsel's actual lodestar in this seven-year litigation, where the district court found that the defendants' tactics had helped to dissipate the number of claims filed against the fund, where class counsel conferred a substantial

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(Cont'd)

struck portions of defendants' September 10 brief and instructed defendants: "to refile a corrected brief deleting all references to documents that are not actually in the record on appeal." (October 6, 1998 Order) Defendants on October 13 filed a brief that violated the order, requiring plaintiffs on October 14 to move to strike portions of defendants' October 13 brief that still violated the Court's October 6 Order, and to seek an extension of time to file this brief. The Court has not as of today ruled on plaintiffs' October 14 motion. Plaintiffs are therefore constrained to respond to defendants' October 13 brief, but reserve all rights on this issue.

benefit on the class and would suffer a multimillion dollar loss if defendants' approach were taken, where no class member objected to the fee and expense award, where defendants, not class members, stand to receive 90% of the proposed reduction in the fee and expense award, and where defendants expressly stipulated to the award and advocated its reasonableness to the district court?

3. Whether the district court abused its discretion in awarding class counsel reimbursement of their out-of-pocket expenses, where the court held three separate hearings on the matter and requested supplementary affidavits and backup materials from plaintiffs' counsel, where defendants' expenses — that were disclosed to the district court at its request for sake of comparison — were 63% greater than those awarded to plaintiffs, and where the district court reviewed each expense item on a category by category basis and disallowed in excess of $200,000 of claimed expenses?

4. Whether the district court erred in holding that the deferred portion of class counsel's fee and expense award is freely assignable, where defendants stipulated in their settlement agreement that it would be assignable, where defendants admit there were no restrictions on assignability in the agreement and under the law restrictions on assignment must be explicit, and where restrictions on assignability are void under controlling law even if included in an agreement?

5. Whether defendants, and their counsel, should be sanctioned for prosecuting this frivolous appeal from their own settlement and fee agreement in which they misrepresent the proceedings below, falsely accuse the district court of

personal animus and of fabricating a record and fail to cite the relevant, controlling law?

Standard Of Review

Questions 1, 4 and 5 are issues of law subject to *de novo* review. Questions 2 and 3 are reviewable only for an abuse of discretion.

Statement Of The Case

After seven years of litigation, and on the eve of closing argument after a five month jury trial, defendants and plaintiffs agreed to settle. A $40 million fund was created to pay the claims of class members, with unclaimed amounts reverting to defendant Grosfeld. The parties expressly agreed that class counsel would limit their fee request to a third of the total fund plus expenses, and that defendants would not object either "directly or indirectly" to a request in that amount. Both sides advocated approval of the settlement to the district court. When asked about the *bona fides* of the agreement, defendants told the district court that the settlement, after deduction of the fee and expense request, would provide an "exceptional" recovery to the class and that a fee and expense request in the amount set forth in the agreement would be "well within the range of reasonable."

After obtaining preliminary approval of the settlement and dismissal of the jury, defendants began attacking their agreement in the hope of cutting class counsel's fee and obtaining a larger reversion for Grosfeld. The district court considered and rejected each of defendants' arguments with

extraordinary patience given its understandable frustration at defendants' tactics. The district court then carefully considered the fee request, departing upward from the usual benchmark range of 20-30% to a 33-1/3% fee award based on, among other factors, the extreme complexity and duration of the litigation, the novelty of the issues and the skill required, and the risk of prosecuting a commodities class action. No class member objected to the fee; the only objection to the settlement was from a single class member who objected to defendants receiving any unclaimed funds.

The record supports but one conclusion: defendants engineered a premeditated breach of their own settlement in order to derail an imminent jury verdict and obtain the benefits of their settlement including their negotiated cap on class counsel's fees, the reversion they now enjoy and dismissal of all claims. Their downside thus protected, defendants now seek this Court's assistance in rescinding their express agreement on fees and expenses. Recognizing that the record bars this appeal, defendants claim that they were "coerced" into their agreements by class counsel and a hostile, biased district court that "consciously disregarded" controlling law in order to "punish" them and "send a message" to the commodities industry. Defendants then accuse the district court of actually fabricating defense counsel's statements supporting the reasonableness of the fee and expense request (AB 31) — even though defendants did *not* dispute those statements when they were put on the record below.

Defendants then invent for this appeal supposedly possible alternative settlements which they now claim they

"would have" agreed to and which class counsel "should have" embraced. They would have this Court ignore that it was they who insisted on the reversionary settlement. Defendants also invent industry lore, but produce no support, that reversionary settlements are "very rare" and that the fee award in this case is 400% greater, relative to actual distributions, than any case on record. What declarations they do rely on, they filed long after the final fee hearing and just days before the final hearing on costs — and then failed to appear at the hearing to be cross-examined on their sworn statements. Why? Because none of this was done for the benefit of the district court. Defendants knew their declarations were "not credible" and "contrary" to all their prior representations supporting the reasonableness of the fee and expense award — as the district court noted in its final order. Defendants' belated flurry of declarations filed in the district court was part of a calculated strategy to fabricate a record to support their effort to renege on, and appeal from, their express agreements.

Defendants fail to mention the leading class action fee award precedent in this Circuit — *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) — which, as here, involved a reversionary settlement and which rejected as having "no merit" the argument that no true "common fund" had been established because of the reversion. *Id.* at 771 n.2. Defendants simply ignore the district court's step-by-step analysis of *Camden*, and discussion of the twelve relevant fee factors suggested by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) — which defendants also fail to cite.

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Defendants' version of the facts, a version which they were unwilling to submit to the jury, and their arguments on the law, the jury instructions and the district court's many interlocutory rulings, are of course irrelevant to the issues on appeal. It's too late to complain of an allegedly "biased" district court's "patently erroneous rulings," that deprived Grosfeld of his day in court. Defendants declined to accept the interlocutory appeal which the district court offered them, and which would have provided the correct path to challenge these rulings prior to entry of judgment on the jury's verdict. Defendants instead decided to avoid appellate risks. The Court should hold them to that decision.[3]

The Court should also reject as both irrelevant and meritless Grosfeld's portrayal of himself as the sympathetic victim of a baseless strike suit. This case did not allege "churning" in individual discretionary accounts; it alleged a top-down, unified and successful scheme, pushed by Grosfeld, to bilk investors of virtually all their capital through a variety of time-proven telemarketing boiler room

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3. Defendants' Commodity Exchange Act ("CEA") "aider and abettor" authorities (AB 9-10 n.7), have all been effectively overruled or otherwise disapproved by the only federal appeals court to have considered the matter. *D'Amato v. Hermanson*, 153 F.3d 464 (7th Cir. 1998). Defendants' reliance on *Rolo v. City Investing Co. Liquidating Trust*, 1998 WL 547050 (3d Cir. 1998) (no RICO aider and abettor liability), as evidencing the district court's alleged refusal to follow the law (AB 9-10 n.7) ignores that neither the Eleventh Circuit nor any other circuit has yet decided this issue, and *Rolo* was decided only long after this case was settled and dismissed. These examples only demonstrate the difficult and emerging issues in this area of the law and underscore why it was in everyone's interest to settle and avoid appellate risks.

techniques.[4] This action raises none of the concerns that motivated Congress to enact the Private Securities Litigation Reform Act ("PSLRA") — namely, precluding securities strike suits that ultimately harm the interests of the very class members they purport to champion (*i.e.*, shareholders), by holding corporate treasuries ransom to class counsel based on innocent declines in stock prices. This is not a "securities class action" notwithstanding defendants' repeated and calculated mislabeling. Congress not only expressly created civil aider and abettor liability under the CEA, 7 U.S.C. § 25(a), it made telemarketing fraud in the solicitation of commodity option customers one of the CFTC's highest priorities. 7 U.S.C. § 9b. It was the CFTC that sued defendants' companies for massive sales fraud causing them to go out of business. In fact, rules of the National Futures Association ("NFA"), the industry self-regulatory body that operates in conjunction with the CFTC, require that any commodity firm employing former salespersons of closed firms — specifically mentioning MultiVest Options, Inc. — to adopt "stringent supervision procedures . . . in order to ensure that the improper training [these salespersons] have previously received does not taint their sales efforts on behalf [of their firm]." *National Futures Ass'n Manual*, Vol. 4, No. 1 (as of Oct. 1, 1997) at ¶ 9021, Compliance Rule 2-9, Supervision of Telemarketing Activity. Since Congress gave the federal courts exclusive jurisdiction to hear CEA civil aiding and abetting claims, 7 U.S.C. § 25(c), the federal

4. Given space limitations, we respectfully refer the Court to our April 10, 1996 answer to defendants' earlier unsuccessful writ petition (*In re James Grosfeld*, No. 96-4370) for a point-by-point refutation of virtually all defendants' erroneous legal assertions on class and liability issues.

district courts (and the over-stretched CFTC Enforcement Division) are all that stand between the unscrupulous owners and operators of defunct commodity telemarketing firms and the thousands of commodity investors who are routinely defrauded by such operations.

The question before this Court is not whether a district court should ever consider the reversionary nature of a settlement in determining an appropriate fee. The district court did this. Defendants go much further and urge the Court to adopt a rule that a district court must limit counsel fees to a percentage of the amount of the settlement fund actually claimed, regardless of the circumstances of the case and any injustices that may result. No court has ever taken that approach. Defendants' arguments contradict Supreme Court and Eleventh Circuit precedent requiring an "individualized" approach and permitting class counsel's fee to be based on the entirety of the settlement fund, as well as of decades of jurisprudence giving district courts broad discretion in setting a reasonable fee. It is telling that defendants now ask this Court not only to divest district courts of discretion generally, but to remand the case for an alternative fee determination by a different judge who has no familiarity with this seven-year litigation, and defendants' vexatious and costly tactics — all of this so defendants can renege on their agreement and obtain a reversion of 90¢ of every dollar they propose be cut from counsel's fee.

Defendants' further suggestion that the district court somehow changed the settlement agreement by making plaintiffs' deferred fee obligation assignable is meritless. Defendants again distort the settlement agreement and fail

to cite controlling authority holding that the right to receive payment of money is a right that is assignable as a matter of law.

Statement of Facts

1. Grosfeld's Companies and the Genesis of this Class Action

This class action arose from the fraudulent sales activities of a South Florida telemarketing boiler room called MultiVest Options, Inc. ("MOI"). MOI, and its parent, International Precious Metals Corporation ("IPMC"), had a long-standing history of serious federal regulatory problems. In 1982, the CFTC, the governmental agency charged with regulating precious metals and commodity sales, sued IPMC for, among other things, fraudulent sales solicitation. (R82-1396 at 1130) Although IPMC quickly paid the government a $200,000 fine and agreed to change its business practices, it later began using the same offices and management personnel to telemarket exchange-traded commodity options through its wholly owned subsidiary, MOI. (R92-1406 at 3303-04) The CFTC and the NFA began a lengthy investigation of MOI's activities. (R82-1396 at 1141-43) In 1988, the NFA sued MOI for company-wide fraudulent sales practices and imposed the then largest fine ever assessed in NFA history. (R82-1396 at 1245-49; R92-1406 at 3400; R83-1397 at 1462) Grosfeld's lawyers, upon receiving the complaint, described it as, "alleg[ing] garden variety fraud," but "containing certain allegations which have class action potential." (PX 377, 380) In January of 1990, the CFTC sued MOI for company-wide, management supervised patterns of

misconduct and sought an injunction to close the company permanently. (PX 737; R31-1365 (Foley Dep) at 390)

James Grosfeld, through a holding company called MultiVest, Inc. ("MVI") owned and controlled 100% of both IPMC and MOI. (R89-1403 at 2696) While defendants claim that Grosfeld was never named in the CFTC complaint, negotiations with the CFTC and his lawyers' investigation led all to conclude that he would be named (R31-1365 (Foley Dep) at 334-35); this ultimately caused MOI to stipulate to a permanent injunction and to go out of business — as evidenced by a note discussing the risks of fighting the CFTC action:

1. Dump evid[ence] on pub[lic] record
2. Class actions road map
3. Increased likelihood of JG [i.e., James Grosfeld] being named and officers
4. Lessens ability to settle in future
5. Publicity

(PX 425 (Ex. Q to DE 1049), *see also* R92-1406 at 3293) Other problems noted in fighting the CFTC action were: "Too expensive, will lose, possible receiver." (PX409[5] (Ex L to DE 1049); R31-1365 (Foley Dep) at 341-43)

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5. The CFTC receiver, after taking control of MOI's insolvent estate, waived the company's attorney-client privilege. *See* (Cont'd)

Upon filing of the CFTC complaint, Grosfeld fraudulently transferred millions of dollars in assets of the holding company MVI to himself and his minor son without consideration and without input from the company. (R92-1406 at 3289-3293, 3320-3324) This class action was then commenced in April of 1990 to recover investor losses from Grosfeld. The very day plaintiffs filed this class action complaint, Grosfeld began transferring over $30 million (later over $50 million) — without consideration into a tenancy by the entirety with his wife, an effort which the district court found to be not only "constructively fraudulent," but motivated by Grosfeld's "actual intent" to defraud the plaintiff class by leaving them with nothing more than a "paper judgment." (R17-692 at 3, 8, 12)

2. The Proceedings Through Trial

Defendants made the case expensive. Following a 28 U.S.C. § 1404 transfer, several judicial reassignments, initial discovery and briefing, the district court certified the case as a class action in 1993. (R4-150) The case subsequently proceeded with exhaustive merits discovery with 50 document productions around the country (R32-1480 ¶ 14) and voluminous motion practice of more than 125 motions (including 14 motions for summary judgment or

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Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) (authorizing such a waiver). Although the district court held that the specific lawyer notes mentioned above were inadmissible for purposes of trial (because of Fed. R. Evid. 408), plaintiffs asserted error in that ruling and are entitled to refer this Court to that evidence on this appeal. (R25-1058)

partial judgment). Defendants were cited numerous times for frivolous and contemptuous tactics. (*E.g.*, R3-114, R8-331, R11-471, R13-543, R8-351) The case was set for trial on several occasions and as each trial date drew near, defendants filed motions for delay. (*See* Docket at DE 389, 506, 1089) In 1996, defendants unsuccessfully petitioned this Court for a writ of mandamus setting aside the district court's class certification order and dismissing the case.

Defendants then asked the district court for permission to file an interlocutory appeal pursuant to 28 U.S.C. 1291(b). (R19-781; R21-989) The district court told defendants then — and on repeated occasions afterwards — that after developing a trial record it would allow defendants an interlocutory appeal of all of the class certification and complex liability issues prior to entering judgment on the jury's verdict. (R19-789; R28-1228; R126-1442 at 8303; R129-1434 at 8339, 8344; R132-1518 at 60, 89) The district court also adopted a trial plan that would permit defendants (following remand from that interlocutory appeal) to engage in individualized proceedings to rebut the reliance of each class member on any fraudulent omission found by the jury. *Waters v. International Precious Metals Corp.*, 172 F.R.D. 479, 485-89 (S.D. Fla. 1996). Thus, defendants' "coercion" argument about a non-bondable judgment is specious.

Following a month-long pretrial proceeding held in September of 1996, the district court commenced jury trial of this matter on October 7, 1996. Forty-eight witnesses testified at trial and approximately 950 exhibits were introduced into evidence. The record of these proceedings fills approximately 8350 pages in 55 volumes. Documents

directed to Grosfeld included the following statements about the sales practices of his companies:

> IPMC's niche in the ETO business is similar to its market position in leverage and dealer options. It is a high-priced product targeted at unsophisticated individuals and sold through aggressive telemarketing. (PX 148 at I-8)
>
> The competitive environment has traditionally been ignored since the belief is that the company develops its own market and sells to these individuals through high-pressure sales tactics. (*Id.* at III-1)
>
> In a stable price period, the customer stands little chance of making gains and customer turnover is high as customers are sold, lose their money and don't return. . . . Customers seldom call-in to buy these options but are sold the investment through high-pressure sales tactics. (*Id.* at I-6)
>
> In periods of relative tranquility, purchasing leverage contracts is not based on economic rationality but on high pressure selling techniques. (*Id.* at I-5)
>
> Reselling [ETOs] is a function of persuading the customer that his funds are better used in an alternative commodity option. This requires basic knowledge of information on commodity trends. At present, this information is disseminated by

> Irv Rice in five minute Ft. Lauderdale office meetings prior to opening trading. Irv does no formal research prior to his presentations. (*Id.* at II-15)

Documents specifically addressed to Grosfeld also evidenced that his constant pressure on management to sell these "unsophisticated" customers through "high pressure" tactics was causing compliance problems. Among other notable references are the following:

> Mr. Grosfeld's impact on the company is enormous and has had a negative effect on management recently. (*Id.* at II-1)

> Mr. Grosfeld's approach to the company is seen as strictly short-term financially oriented. Because he is the only shareholder, management bends backwards to meet his concerns. (*Id.*)

> In practice, Mr. Grosfeld is CEO and K. Jerry Phillips is Chief Operating Officer. (*Id.* at II-19)

> When Mr. Grosfeld speaks to others in the organization, it appears to undermine the COO and the management objectives and guidelines of the company. For example, when Mr. Grosfeld spoke to a sales manager directly, the pressure created by the volume requests caused a serious deviation from compliance standards. (*Id.* at II-2)

> This uncertainty about Mr. Grosfeld's motives and methods spills over to senior management. (*Id.*)

Additional evidence demonstrated that Grosfeld improperly pressured sales managers to increase sales. (R97-1411 at 3842, 3850, 3851-52) Senior management wrote to Grosfeld, urging him to stop with his threatening management style that was undermining compliance standards and leading to high-pressure sales tactics: "Profitability is driven by sales. Sales are not created through threats, coercion or withholding income that employees believe is fair." (PX 203 at 3) Senior management advised Grosfeld that his "temperament and expectations are not totally consistent with the nature and volatility of this company's business and success requirements" (*id.*), and told him in tactful terms that the company needed "to be managed with a light hand." (*Id.* at 5) Grosfeld's domination allowed him to execute transactions involving hundreds of thousands of dollars without the knowledge of anyone else in management. (PX 128) Grosfeld demanded and received daily faxed sales reports even though the compliance manager told the Vice Chairman that Grosfeld's obsession with daily profits was creating problems. (R89-1403 at 2805; 2833-34; R114-1439 at 7160-61; R92-1406 at 3853-57) Efforts to create a buffer between Grosfeld and MOI's president, Jerry Phillips, failed to alleviate Grosfeld's intolerable interference in the company, as evidenced by the following note from Phillips to Grosfeld:

> You originally told me that your intention in bringing Selwyn [Isakow] in was so I wouldn't

> have to deal with you because it was difficult. Selwyn has the same or more difficulty dealing with you and in fact is structuring a deal so he can minimize how much he has to deal with you regarding MultiVest Options. In addition, I am having to do deal with Selwyn in exactly the same manner as I had to deal with you — so nothing has changed. In fact, it can be more difficult since you are still the major decision maker. (PX 151)

Defendants' arguments about Grosfeld rarely visiting the company evidence nothing more than Grosfeld's efforts to shield himself from liability for MOI's actions. Grosfeld purported to resign from formal management and entered into so-called "consulting" agreements that compensated him for his "substantial day-to-day" involvement in the company. (PX 142) Grosfeld took pains to make sure that his name was removed from certain documents that could tie him to the company in the eyes of investors. (PX 396, 235) Grosfeld's involvement was "kept very secret." (PX 396, 235; R113-1427 at 6912; *see also* R82-1396 at 1150) Phillips, in a communication with Grosfeld, specifically noted his own role in shielding Grosfeld from liability:

> In position as Chairman, Chief Executive Officer and President [I am] on the front-line from the standpoint of liability and reputation — and [have] and continue [ ] to shield the owner [i.e., Grosfeld] from the negative aspects of this business. (PX 465)

And the ugliness of the facts developed at trial demonstrates why Grosfeld needed a liability "shield."

Appendix M

Defendants' efforts to paint MOI as a professional organization, with a few bad apples, ignores the record evidence. Part of defendants' scheme was just the approach that defendants try on this Court: MOI held itself out to be a reputable firm of commodity professionals who would help customers understand and manage the risk of investing in risky options in return for an exorbitant 25% commission levied on each trade. (PX 17, 29, 230, 264; R82-1396 at 1214; R83-1397 at 1443, 1448-49) But MOI promoted a unified "Ask for Action" training program that stressed high-pressure manipulative sales tactics that included the use of fraudulent sales scripts expressly designed to lead customers to believe that they would maximize potential profits and minimize the risks by investing with MOI. MOI accordingly trained brokers on how to develop a "counselor" and "trusting" relationship with customers to manipulate them into relying on MOI's presentation that the customer could achieve financial objectives by trading options with MOI. (PX 459 (at 8-57, 8-14, 8-26), 462, 577, 334; R97-1411 at 3912; R82-1396 at 1218-19, 1221, 1241-42; R84-1398 at 1707, 1694-95, 1697, 1714-15, 1687-88; R76-1390 at 232-255; R80-1394 at 668-69; R31-1362 (Nafeiy Dep) at 38-39, 86-87)

Even MOI's Director of Compliance admitted to the basic fraudulent content of MOI's core presentation to customers (it wasn't "reasonable" for customers to believe that they could achieve their financial goals by trading regularly at MOI), and that he complained to President Phillips about it. (R82-1396 at 1221 *see also* R78-1392 at 562)

It was far worse than just this one big lie. Sales managers engaged in widespread and repeated patterns of fraudulent

practices including condoning excessively aggressive tactics, using known corrupt salespersons as role models to teach other salespersons their tricks, unduly pressuring salesmen for additional production. (R97-1411 at 3857-59, 3861; R82-1396 at 1154-57; *see also* R78-1392 at 576, 579-581; R82-1396 at 1158, 1169, 1171, 1183)

And at the "heart" of MOI's training program, according to the Vice-Chairman, was teaching salespersons to use high pressure sales tactics. (R97-1411 at 3913) Hardly what customers expected from the trustworthy counselor MOI held itself out to be.

Not surprisingly, in this top-down and bottom up boiler room culture, both salespersons and compliance officers testified about the rampant use of various frauds *du jour*, telephone tricks, misleading sales scripts, threats and intimidation by management to encourage excessive trading of accounts, management rules that made it difficult for customers to obtain return of their moneys, the public humiliation of compliance officers who tried unsuccessfully to enforce CFTC and NFA rules, the inability to fire and indeed the rewarding of known fraudulent salespersons who were high producers, and the outright teaching of practices including "rolling," "loading," "bumping" and "net trading" which managers expressly *taught* salespersons should be used to "burn" and "churn" customer accounts. (R76-139 at 249-314; PX 462, 253, 470, 576-583; R31-1365 (Foley Dep) at 299-301; R77-1391 at 421-22; R80-1394 at 666-68, 670-71, 673-77, 681-82, 735; R81-1395 at 1005, 1070-75, 1055-57, 1087, 1092; R82-1396 at 1152-57, 1159-60, 1163-64, 1185, 1292-93; R84-1398 at 1548-49, 1551-63, 1685; R97-

1411 at 3863-64, 3866, 3869, 3878, 3881-82, 3912; PX 230, 459, 470, 502, 508, 509; R31-1362 (Nafeiy Dep) at 36-39, 43, 45-48, 55-56, 59-61, 66-67, 71-74, 77-78, 83, 86-87, 100-01, 131-32, 135-36, 146-49, 227, R78-1392 at 550, 562, 569-80, 585, 587-588, 590-91; R31-1362 (Rennie Dep) at 26-28, 37-39, 40-41, 44-45, 74, 97-98, 113-16, 121; Vol. II, 10-11, 163; R31-1363 (Dorsch Dep) at 114-46, 152-70, 189-95, 206-08, 222-27, 237-40, 266, 328-29, 346-48, 360, 451-52, 463-65, 468-69)

A company compliance officer summed up the boiler room atmosphere of MOI as follows:

> They had whistles and they would clap, when they made a good buy, when they sold out a new position, when they got new clients, it was very hyped. A lot of them walked around, waved their arms and paced and spun their chairs around and high-fived each other. It was, you know, like a zoo. (R80-1394 at 672:24-673:3; *see also* R84-1398 at 1563-64; R78-1392 at 587-88)

When the federal regulators audited the company, salespersons and compliance personnel were instructed, with the knowledge of the compliance department officers, to hide their scripts, sales materials, and compliance memos from the regulators and to falsify logs of compliance monitoring by the company before showing them to the regulators. (R99-1413 at 4167-69; R76-1390 at 263; R78-1392 at 572-76; R80-1394 at 691) When the CFTC became skeptical about MOI's documentation purporting to evidence discipline of corrupt salespersons, and asked for specific information

about salespersons who were allegedly fired, the company had its attorney Mr. Bonner forward false information to the agency. (PX 330; R110-1424 at 6287-6322)[6]

The result of defendants' operation speaks for itself: MOI lost $122.4 million for its customers (R88-1402 at 2482; *see also* R92-1406 at 3328-33), of which $96.2 million, or 81%

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6. The sales practices at MOI are strikingly similar to those described in cases involving the criminal prosecution of commodity option boiler room operators. *See, e.g., United States v. Brien*, 617 F.2d 299 (1st Cir. 1980). Defendants' suggestion that Grosfeld's companies were not "boiler rooms" because they had fancy offices in several cities, employed numerous persons and provided the CFTC standardized risk disclosure statement is a common refrain that courts and regulators have repeatedly rejected. *See, e.g., Kelly v. Carr*, 442 F. Supp. 346, 350-354 (W.D. Mich. 1977) *aff'd in part, rev'd in part on other grounds*, 691 F.2d 800 (6th Cir. 1980) and *Kelly v. Carr*, 567 F.Supp. 831, 836-838 (W.D. Mich. 1983) (rejecting these arguments and giving a detailed description of a large, organized commodity option boiler room which, like MOI, used canned sales scripts and high-pressure sales tactics); *see also Clayton Brokerage Co. v. CFTC*, 794 F.2d 573, 580-81 (11th Cir. 1986) (risk disclosure statement does not prevent liability under the CEA). For a detailed discussion of telemarketing fraud in the sale of regulated commodity exchange traded options, and other financial instruments, that addresses and rejects defendants' various arguments, see *The Nature And Extent Of Telemarketing Fraud And Federal And State Law Enforcement Efforts To Combat It*, Hearings Before The Commerce, Consumer and Monetary Affairs Subcommittee of the Committee on Government Operations, House of Representatives, One Hundred First Congress, Second Session, July 11 and 12, 1990, statement of Dennis Klenja, Director of CFTC Division of Enforcement at 667, 678; Statement of Lawrence H. Fuchs at 424-25; statement of Kent Neal at 141.

of the loss, went to MOI as commissions. (R88-1402 at 2485-86; *see also* R92-1406 at 3329-33) Ninety-four percent of MOI customers lost money. (R88-1402 at 2484) The average loss was $5888, and the average profit of the 5.7% who escaped MOI was $2400. (*Id.* at 2484) MOI officers knew how poorly their customers were faring from internal reports. (R78-1392 at 521-22; R92-1406 at 3358-59) Even then Grosfeld wanted to *increase* the commission to 40%. (R92-1406 at 3360-61)[7]

The district court, contrary to defendants snipes was not sending a message to the ETO industry or punishing defendants for the sale of ETOs (AB 37); it was considering a boiler room, which happened to sell ETOs and which was giving the legitimate ETO industry a black eye. *See also* Reply on Summary Affirmance motion at 16-18 & n.6. The NFA now requires monitoring of former MOI salespersons, not of all ETO salespersons.

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7. Defendants complain that the Court would not allow "industry based evidence" that 90% of all commodities investors lose. (AB 22) The district court ruled correctly, however, that industry folklore and other ersatz expert testimony did not meet *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) standards. In any event, it didn't matter how the customers at other firms did; the point was that MOI's core sales presentation was fraudulent and nobody in their right mind would have invested with MOI had they known about MOI's rotten-to-the-core boiler room culture. *See, e.g., Apache Trading Corp. v. Toub*, 816 F.2d 605, 608-11 (11th Cir. 1987) (noting it is actionable fraud under the CEA to promise advisory services which the company has no intention or ability to provide).

3. The Settlement Negotiations

a. Early Unsuccessful Negotiations

Defendants' unsupported assertions that plaintiffs assumed unreasonable settlement positions and thereby precluded early resolution of the case, is contrary to the record evidence. (AB 45, 50) Defendants precluded meaningful mediation in 1994 by willfully disobeying the district court's orders requiring Grosfeld to make certain financial disclosures (necessitating the district court's further intervention at that time). (R12-494) Defendants failed to respond to numerous settlement overtures made by plaintiffs' counsel and flatly rejected at least two offers by the court to help the parties with settlement — including the district court's offer to provide a non-binding "summary jury trial" and the special master's offer to serve as a third-party escrow agent for the blind exchange of settlement numbers. (R35-1539 at ¶¶ 6-26)[8] Defendants always made clear that they were going to trial and would not settle for anything approaching the $40 million fund that they eventually paid. (R35-1539 at ¶ 25) The record evidence demonstrates that defendants did not engage in any serious settlement negotiations until this Court denied their writ petition and the district court commenced trial. (R35-1539 at ¶¶ 6-26 and ¶ 25 particularly)

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8. Plaintiffs brought this episode to the district court's attention in response to Mr. Kaminsky's false declaration accusing plaintiffs of having prolonged the litigation. (R35-1539 at ¶ 16) Mr. Kaminsky, one of the defendants' counsel, then denied knowing about this event, even though the record discloses he was there. (R35-1546 at ¶ 8; R48-642 at 845-48)

b. Final Negotiations

At or about the time the trial began in September 1996, defendants put plaintiffs' counsel in touch with Mr. Dodyk for purposes of discussing a settlement. It was during these lengthy and ongoing discussions that *defendants* — not plaintiffs — insisted on a reversionary settlement. (R35-1540 at ¶ 11) Because the sides were historically so far apart on their numbers, and mutually mistrustful, the parties felt that the best way to obtain settlement momentum was to complete to the last detail the settlement documents before discussing specific numbers. (*Id.* at ¶ 5) This process would also ensure that once the parties reached agreement on numbers, negotiations would not break down over the details and the complicated documentation. (*Id.*) Thus, contrary to defendants' suggestion (AB 27), plaintiffs had agreed to a reversionary settlement long before closing arguments.

Each provision of the written documents was negotiated at arms-length. (R35-1540 at ¶¶ 5-7) The settlement stipulation provided that Grosfeld would create a settlement fund against which claims could be filed by class members and from which the fees and expenses of plaintiffs' class counsel and the settlement administrator would be paid. (R31-1371 at ¶¶ 2.2, 6.3) Of this amount 25% was to be paid in cash. (*Id.* at ¶ 2.2) The remaining 75% was to be paid in the form of an interest-bearing master promissory note secured by an irrevocable letter of credit from a prominent national bank. *Id.* The settlement provided for a plan of allocation among class members who timely filed claims with a third-party settlement administrator in relation to each class member's recognized loss as a percentage of the settlement

fund as a whole. (*Id.* at ¶ 6.3) Any amounts not claimed by class members or used to pay the fees and expenses of counsel and the settlement administrator were to revert to Grosfeld. (*Id.* at ¶ 6.2(e))

Class counsel negotiated for the free transferability of the promissory notes so that class members who did not wish to hold their notes and earn the interest could immediately hypothecate them:

> The individual Promissory Notes shall not be restricted to prevent them from being sold or discounted to other persons or financial institutions and shall be transferable to the heirs and assigns of Authorized Claimants. (R31-1371 at ¶ 2.2)

Plaintiffs' counsel expressly told defendants' counsel that they may seek to collateralize any deferred portion of their fee. (R33-1503 at ¶ 3) Plaintiffs' counsel, contrary to defendants' assertions (AB 60-62), specifically negotiated for a provision making any deferred portion of the counsel fees payable on the same terms as the freely transferable promissory notes:

> Any fee award which is not paid in cash shall be paid in a form of an obligation having the same terms and bearing the same interest rate as the Promissory Notes [to individual class members], as defined in the Stipulation. (R31-1373 at ¶ 12)

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As the district court noted, this term appeared in the January 31, 1997 preliminary approval order, which was fully incorporated in the Stipulation. (R33-1515 at 2)

Defendants expressly agreed not to object to a fee of up to one third of the *gross* settlement fund amount, plus expenses, *in return* for plaintiffs' agreement not to request a larger fee:

> Plaintiffs' Class Counsel of Record *shall* apply for fees in an amount *not to exceed* 33-1/3% of the *Settlement Fund* plus their costs and expenses. . . . Defendants will *not directly or indirectly oppose* Plaintiffs' Class Counsel of Record's application for fees and expenses or compensation of the Representative Plaintiffs. (R31-1371 at ¶ 7.1) (emphasis added)

The stipulation also stated:

> The parties intend this Stipulation to be a *final and complete* resolution of *all disputes* between them with respect to the Litigation and the Conveyance Litigation. In addition, the Defendants agree that the amount paid to the Settlement Fund reflects a good faith settlement of the claims of the Representative Plaintiffs and the Settlement Class, reached *voluntarily* after consultation with competent legal counsel. (*Id.* at ¶ 10.1) (emphasis added)

The stipulation also provided:

> The Plaintiffs' Settlement Counsel and Defendants shall use their best efforts in good faith to secure approval of the Settlement Agreement set forth in this Stipulation and shall not attack this Stipulation in the settlement approval process. (*Id.* at § 2.11)

Not only did Grosfeld agree to these provisions, he expressly agreed in the Note Administration and Pledge Agreement, that any effort to contest the validity or enforceability of any of these settlement provisions would constitute an "event of default" under the settlement. (R31-1371, Ex. F-3 at 4)

The parties also drafted and stipulated to a form of class notice that expressly told class members that counsel would be requesting a fee and expense award of one-third of the gross settlement fund amount, plus expenses, that class members would receive no more than 20% of their recognized losses if the fee request were approved, that any unclaimed amounts would be returned to defendants and that defendants would not be objecting to the requested fee. (R31-1371 at Ex. A1 ¶¶ 28, 29)[9] Moreover, the timing of the fee hearing — which was to take place, as is typical, prior to the expiration of the claims process — also documents the

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9. Defendants' accusations that the co-drafted class notice was misleading rests on their absurd assumption that the notice was supposed to anticipate the number of claims that would be filed and then summarize the arguments defendants make before this Court. (AB 33, 58)

parties' intention that the fee would be based on the amount of the settlement fund and not merely on the number of claims filed.

Although the parties successfully negotiated a complete set of settlement documents, they had difficulty agreeing upon an amount for the settlement fund. Defendants' counsel finally called plaintiffs' counsel and offered to fund the settlement with $40 million in cash and notes only on the evening before closing arguments. (R35-1540 at ¶ 6) Defendants' prior offers had been below that amount by in excess of $10 million. (R35-1539 at ¶ 26) Contrary to defendants' view, class counsel did not suddenly cave. Defendants finally made a very reasonable offer, while class counsel were concerned over difficult threshold jury instructions, detailed verdict questions, novel issues and lengthy appeals. (R32-1480 at ¶¶ 17-18; R34-1538; R129-1434 at 8338, 8340)

4. Preliminary Approval of the Settlement and Dismissal of the Jury

When the district court learned of the settlement — just moments before closing arguments — it specifically asked about the amount of attorneys' fees that would be requested and whether that amount had been "worked out" by the parties. (R126-1442 at 8259) The district court was told that the parties had agreed that plaintiffs' counsel could — without objection — request a fee amount of up to 33-1/3% of the $40 million settlement fund plus costs and that costs were "north" of $2 million. (*Id.* at 8268) The district court then expressly summarized its understanding of the

agreement by noting that an award of the agreed-upon fee, if allowed, would result in a net settlement fund for distribution of approximately $24 million. (*Id.* at 8268)

With the jury waiting in the jury room to hear closing arguments following this lengthy trial, the district court was understandably taken aback by having to parse through a lengthy and complicated settlement document. The court stated it was inclined to go forward with closing arguments, and to take a sealed verdict while reviewing the terms of the proposed settlement. (*Id.* at 8257) But because the settlement would cease to be binding once the jury was charged, the district court postponed closing arguments and sent the jury home. (*Id.* at 8261-62, 8290) It was in this context that the district court made the off-the-cuff comment about counsel "cutting and running" that defendants now point to. (*Id.* at 8293) What defendants leave out is that the district court, after taking time to review the settlement and meeting with the parties, later apologized on the record for this comment and explained that the court had been frustrated with being presented with the settlement for the first time before closing arguments in a lengthy case. (R129-1434 at 8342)

For several days, the district court conducted a series of hearings and conferences to review the details of the settlement. While some of these conferences took place in chambers off the record or by telephone, the court later recited on the record various statements which defendants now deny making, although defendants did not dispute them at the time they were put on the record. During those meetings, the court raised various concerns about the settlement agreement and obtained various concessions from

both sides. (R127-1440; R128-1441) At no time during these discussions did defendants suggest they had a "projection" of any claims rate. Defendants did not then tell the district court they had been "coerced" into the settlement. Defendants did not then tell the court they were forced into a "clear-sailing" agreement. To the contrary, Mr. Dodyk, defendants' settlement counsel, vociferously argued that the settlement was fair and reasonable and that even after deduction of the proposed fee the settlement would represent a recovery which, in his experience, was exceptional. (*See* R132-1518 at 35) Indeed, the parties *jointly* presented the district court with a study done by the National Economic Research Association ("NERA") as supporting the fairness of the settlement and reasonableness of the fee request. (R133-1535 at 25-26; R35-1544 at 3-4 & n.3) Defendants' counsel, when asked about the fee, assured the district court that "a fee of one-third the gross amount of the settlement fund would be well within the range of reasonable," "perfectly reasonable." (R132-1518 at 42; R133-1535 at 26; see also R35-1544 at 4)

After several days of exhaustive review, discussion and modification of the settlement, the district court held a hearing in open court, at which time Mr. Cooper, plaintiffs' settlement counsel, again on January 31 set forth the basic terms of the settlement and summarized some of the in-chamber discussions. (R129-1434 at 8323-32) The NERA report, which had originally been produced in chambers, was officially made a part of the record. (R31-1444) Mr. Cooper then specifically stated that the settlement represented "20 percent recovery to the class of their out-of-pocket losses after deduction of the attorneys' fees, which we will request,

and have requested, of one-third of the recovery plus expenses." (R129-1434 at 8330:17-20) Mr. Cooper also stated: "This is a very significant recovery, your Honor, . . . considering other class actions that are settled in the United States." (*Id.* at 8330:24-25) When the district court asked defendants if they had anything to add, Mr. Dodyk stated that he believed Mr. Cooper had correctly outlined the settlement and that he had *nothing* further to add. (*Id.* at 8336-38)

The district court then entered the stipulated preliminary approval order and told the parties it was dismissing the jury. (*Id.* at 8351-52) That order *again* expressly states both that (1) defendants are *not* objecting to the fee and expense request, and (2) any deferred portion of that fee and expense award will be subject to the same terms as the Promissory Notes (which are freely assignable). (R31-1373 at ¶ 12) The district court set a final approval hearing for March 31, 1997, at which time class members who had filed timely objections to the settlement notice could appear at the hearing, if they desired, and be heard.

5. Defendants' Breaches and the District Court's Fairness Hearings

Having locked class counsel into their negotiated fee cap through entry of the preliminary approval order and dismissal of the jury, defendants then began to undermine and renege on their agreements. First, they attempted to minimize the number of claims filed by class members by instructing the settlement administrator not to use an address locator service — requiring the district court's intervention.

(R130-1550 at 4-5) Next, defendants urged the district court to wait to see how many claims were actually filed against the settlement fund and only award plaintiffs' class counsel a percentage of the amount actually claimed, as opposed to a third of the fund created as they had stipulated. (R132-1518 at 82) Finally, defendants took issue with virtually every item listed on plaintiffs' counsel's expense application. (R32-1493, R33-1513, R34-1529)

One of the first issues addressed at the March 31, 1997 fairness hearing was the settlement administrator's draft engagement letter (estimating a class claims notice response rate). Defendants serve up a hearsay declaration in support of their assertion that plaintiffs counsel tried to "suppress" the administrator's estimate of the response rate. (AB 34) This is not only untrue, it is a perversion of the far more serious misconduct by defense counsel to mislead first the district court and plaintiffs, and now this Court. That January 24, 1997 letter on its face shows it was sent *solely* to Mr. Dodyk prior to the January 31 preliminary approval hearing. Mr. Dodyk apparently hid the letter from the district court and class counsel, who did not receive it until after the *jury* was dismissed. (R132-1518 at 7) It was *plaintiffs' counsel* who then insisted that the district court put this matter on the March 31 agenda so the court could examine Mr. Dodyk as to his reasons for not previously sharing this letter, and to enlist the court's assistance in obtaining from the settlement administrator a formal undertaking that would, among other things, ensure that all reasonable efforts be used to locate class members. (*Id.* at 8-10) When the court questioned Mr. Dodyk on these matters, he had to admit on the record that the letter had been sent solely to him. (*Id.* at 10) He then

attempted to justify his conduct and to prevent the court from getting involved in defining the settlement administrator's duties (*i.e.*, searching for class members) by telling the court that it was neither customary nor appropriate for the district court to involve itself in such matters. (*Id.* at 10-11) The district court disagreed and said it wanted to be involved in obtaining a formal undertaking from the administrator. (*Id.* at 12-13)

It was only after Mr. Dodyk was exposed by plaintiffs finding out about the letter, that he *on March 7* first filed the letter with the district court as an attachment to his argument that the district court should not instruct the administrator to use an address locator service. (R32-1493) And then only after his personal debacle at the March 31 hearing did he file his April 24 declaration to which he now cites. (AB 34) His April 24 declaration was for the purpose of creating an appellate record to falsely suggest that class counsel had some *prior* "projection" of claim estimates. The fact remains, however, it was Mr. Dodyk who "suppressed" this letter until after the settlement was preliminary approved and the jury was dismissed.[10]

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10. Defendants also erroneously suggest that class counsel had indications from the MOI receivership claims experience that few class members would file claims against the settlement fund. (AB 28) The exact opposite is readily apparent from the record (R34-1539 at ¶¶ 32-34) and the receiver's Notice and Proof of Claim form (PRS 1 and 2). First, the receiver's Notice, citing statute of limitations defenses, strongly discouraged claims from all customers other than those trading ETOs during the last two years of MOI's five-year existence — thus most of MOI's 20,000 customers would not have been expected to respond. Second, there was little

(Cont'd)

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Out of a class of approximately 20,000 individuals, the court received only one objection to the settlement. (R132-1518 at 38-39) That objection came from Carol Orkin who objected to defendants receiving any reversionary interest in unclaimed funds. She told the district court she did not object to class counsel's fee and expense request. (*Id.* at 63:12-22) Furthermore, no class member has intervened or appealed the district court's final approval order.

The district court reviewed the history of the case, including the in-chambers, off-the-record discussions, noting that even defendants had agreed that the settlement, after deduction of fees and costs, would "produce an exceptional benefit to the class members." (R132-1518 at 35) The district court went on to note that defendants had — prior to the jury's dismissal — expressly supported the reasonableness of the fee:

> Now, I do want to note that the settlement's stipulation that the — excuse me, that the fee request of one-third of the settlement fund is the

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motivation to file claims against a receivership with no stated assets where the claim form required lengthy answers to open-ended defense-type interrogatories to justify MOI's liability to each customer. This $40 million settlement, by contrast, guaranteed each respondent a 20% return of their losses, and offered an 800 telephone help line to answer claim form questions. Third, class counsel expected that the administrator would be able to locate close to 95% of the class members with a locator service. That 3000 out of perhaps the 7000-8000 customers who purchased ETOs in only 1988 and 1989 responded to the unappetizing receiver notice, suggested a large response to a guaranteed average recovery of $1200.

> maximum amount of fees that the parties agreed — the parties, that's both sides — agreed could be sought pursuant to the settlement stipulation that the Court approved at the end of January, *after being assured by both sides that a fee of one-third of the gross amount of the settlement fund would be well within the range of reasonable*. (R132-1518 at 42:10-18 (emphasis added))

All of defendants' counsel who signed their brief in this Court were present in the district court and took no issue whatsoever with the district court's summary of what they had previously said during the in-chambers, off-the-record preliminary approval discussions. In fact, moments later when asked whether defendants wanted to comment on any of the matters being covered, defendants' counsel said they had only one comment concerning the request of class member Carol Orkin for an extension of time in which class members could make claims. (*Id.* at 51:8-25)

Defendants' assertions that the district court never made such a statement *until* its May 8, 1997 order, and that the court fabricated its statements in that order are obviously patent falsehoods. (AB 31) Their arguments on pp. 31-32, however, reveals the heart of their appeal; only if they can convince this Court that the district court lied, do they even have a chance in this Court.[11]

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11. Defendants' desperate array of non-sequiturs and feigned shock to prove the court a liar, only further condemn them. First, that plaintiffs did not refer to defense counsel's statements in support

(Cont'd)

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The district court noted that defendants now wanted to back out of their obligations under the agreement, while obtaining all the benefits and imposing a multimillion dollar loss on class counsel. (R132-1518 at 82-83) Contrary to defendants' assertion that the district court was misled, the court expressly understood that a substantial portion of the settlement fund might not be claimed. (*Id.* at 91-92) The court also noted that even fewer class members would have been able to claim but for plaintiffs' counsel's efforts in overcoming defendants' opposition to the settlement administrator using the locator service to resend claims packets to persons whose addresses had been stale:

> That came about not because of the efforts initiated — not because of efforts initiated by the settlement administrator, as I understand it, but because pursuant to the request of class counsel the Court ended up ordering the settlement administrator to contract with another vendor to

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(Cont'd)

of plaintiffs' fee means nothing. There was no need for plaintiffs to remind the court of the contrast between defendants' in-chambers statements and their conduct. There was nothing plaintiffs could do then about defendants' breach — the relevant question then before the court was to review the reasonableness of the settlement and the fee request. (R132-1518 at 3-4) Second, defendants' "gift" argument — why should we not try to stop the one-third fee award since the court might actually award the one-third fee discussed at the preliminary approval hearing — further betrays that defendants never intended to honor the settlement agreement. The agreement was that plaintiffs would not seek more than one-third of the *settlement fund*, not one-third of the claims eventually made.

obtain updated addresses. (R132-1518 at 37:20-25)

The district court addressed each of defendants' objections and methodically went through each of the relevant fee determination factors required by this Court in *Camden*, noting that most of them resulted in an upward adjustment of the normal fee benchmark. (*Id.* at 85-94) The district court had before it not only the NERA study of nationwide fee awards, but the declaration of Steven Senderowitz of Chicago, who specializes in complex commodities litigation and who has authored articles on commodities and commodities regulation. (R32-1481) He was former deputy chief of the special prosecution division of the U.S. Attorney's office in Chicago where the world's largest commodity futures exchanges are located, and where he was actively involved in the supervision of both on-market and off-market boiler room cases. Mr. Senderowitz' declaration noted the difficult groundbreaking nature of this class action suit against the upstream operators of a defunct commodity telemarketing firm and demonstrated how favorably the results in this action compared to other private commodities litigations and CFTC restitution programs. (*Id.* at ¶¶ 11, 12, 17) Defendants simply ignore this evidence, as well as class counsel's fee application citing to numerous cases throughout the United States (in both published and unpublished decisions) supporting the reasonableness of the fee award. (R32-1482, Ex. D; R32-1480)

Plaintiffs also note that although a party must object to preserve an issue for appeal, defendants repeatedly told the district court that they were not actually objecting to

plaintiffs' counsel's fee and expense award and that they still *fully supported* the settlement. They told the Court that they were merely concerned that certain representations by plaintiffs were incorrect, and might taint approval of the settlement, thereby raising, "the risk that any approval of the settlement by the Court on the current state of the record might be subject to attack [presumably by absent class members and not by defendants themselves]." (R33-1513 at 1-2) They told the district court that although they believed they would have "prevailed at trial and on appeal," they nevertheless "recognize[d] the cost, burdens and uncertainties of this litigation and urge[d] that the Court approve the proposal." (R32-1493 at 6) They told the district court that they were not making any "formal overt objections." (R132-1518 at 190) They told the district court that they supported the settlement and that they "are not going back on any agreement." (*Id.*) When the district court expressed disbelief and stated that it had at least construed defendants' statements as "opposition," defendants told the court it was "overstat[ing]" their position. (*Id.* at 203-204)

The district court awarded plaintiffs' counsel a fee award of one-third of the $40 million settlement fund or $13.3 million, with $5 million of this amount to be payable in cash and the remainder to be payable as a deferred obligation. (R33-1516 at ¶ 14) The court, however, refused to award plaintiffs' counsel the bulk of their expenses, *agreeing with defendants* that additional documentation was necessary. (R132-1518 at 96-98) The court ordered plaintiffs to provide additional detail and further ordered defendants to disclose their own expenses for comparison sake prior to the next hearing. (*Id.* at 103) Those expenses were disclosed

to be in excess of $3.8 million, far greater than those of plaintiffs. (R34-1530)

On April 25, 1997, the district court held a hearing to resolve the remainder of plaintiffs' counsel's expense requests. Three days before that hearing, and long after the March 17, 1997 stipulated deadline for filing objections had expired, defendants filed a motion requesting the district court to alter or amend its prior fee award. (R34-1528) Notwithstanding that defendants and plaintiffs had jointly provided the district court with the NERA study when asking the court to approve the settlement, defendants now attacked that study, claiming to have done a telephone survey of *unidentified* counsel supposedly involved in the cases included in that study, and concluded from their own "hearsay" survey that the fee and expense award was "excessive." Defendants also filed a response to plaintiffs' supplementary cost back-up data. Defendants nonetheless again claimed that they were not really opposing counsel's fee and expense application. (R34-1529; R34-1532 at ¶ 19)

At the April 25 hearing, none of the three defendant lawyers who filed these last-minute declarations appeared in court. The court went through plaintiffs' expense request on an item-by-item basis and awarded those amounts that it deemed appropriate and allowable. The court even held a third hearing on the expense award via telephone on April 28, 1997, after requesting additional information. (R134-1534)

At the end of the April 25 hearing, the district court expressed displeasure that defendants had taken advantage

of her hospitality in having off-the-record preliminary approval discussions and the court noted that defendants had earlier agreed that a fee and expense award in the amount requested and awarded would be "perfectly reasonable":

> [T]he settlement was advocated vigorously by both sides in an effort to overcome my objections to it . . . the court had specific concerns about the amount of attorneys' fees . . . the NERA study was offered by *both sides* . . . as authoritative; . . . *it was represented to me that the fee award sought was well within the range of common practice in these types of cases*; and because I was concerned about the amount of costs, I asked for an estimate at the time.
>
> An estimate was put on the table by the plaintiffs. It is pretty much in line with what the costs have ended up being, and everyone thought that would be *perfectly reasonable*. That's what matters to me. What matters to me is what went on in my conference room. (R133-1535 at 25:19-26:14) (emphasis added)

Although Messrs. Dodyk and Kaminsky, who had filed their last-minute declarations attacking the reasonableness of the fee and purporting to recite fictional settlement discussions, failed to show up at the hearing to be cross-examined, Mr. Bonner was in court *and — once again — did not object to the district court's statements about defendants' prior representations.*

Appendix M

In its final order denying defendants' motion to alter or amend the fee award, the court found that defendants' motion was "frivolous." (R35-1544 at 1) The court also noted that defendants' evidence in support of the motion (namely their continuing unsupported claim that the award is 400% greater, relative to class distributions, than any prior case) was based entirely on hearsay, that it was inconsistent with defendants' counsel's prior representations, and that it was defendants' counsel who previously had advocated the NERA study as supporting the proposed fee: "in those discussions, counsel for both sides assured the Court that their experience and the findings contained in the NERA study would support an attorneys' fee award in [the amount of $13,333,333]." (*Id.* at 3 n.3) The district court even noted that it had personally telephoned the author of the NERA study who contradicted the representations that defense counsel was making about the information contained in the report. (*Id.* at 4)

The district court also noted that defendants' position was contrary to law, including Supreme Court precedent, was in violation of defendants' express stipulations under the agreement, and was contrary to public policy. Specifically, the district court noted that a fee award based solely on the number of claims actually received would reward defendants for having unnecessarily prolonged the litigation (something they are continuing to attempt to do) knowing that the claim rate decreases with the passage of time. (*Id.* at 6) The district court also noted that independent of any objection by defendants, it would be "highly inequitable" under the circumstances of this lengthy and expensive case to adopt defendants' position. The Court noted that its March 31, 1997 *Camden* analysis required an

upward adjustment to the benchmark. (*Id.* at 6-7) Finally, the district court noted that defendants' conduct had been "distasteful" and that notwithstanding their "self-serving pronouncements to the contrary, their contentions can have only one objective — a reduction in the amount of the fees already awarded to Plaintiffs' counsel pursuant to the agreement of the parties." (*Id.* at 7)

Summary Of Argument

Defendants' express stipulations and statements below bar their appeal under any number of doctrines, including standing, mootness, waiver and estoppel.

Defendants fail to discuss the standards governing this Court's review of a class action fee award and ignore the district court's detailed discussion of each of the relevant factors. Defendants assert — without record support — that reversionary settlements are "very rare," that the district court's fee and expense award was 400% greater than any prior award in this Circuit and that class counsel could have, and should have, agreed to a lesser *pro rata* settlement that was never offered.

Supreme Court and Eleventh Circuit precedent recognizes that awarding class counsel a fee based on a percentage of the entire fund created for the benefit of the class promotes predictability, encourages class counsel to fight for a larger fund and takes account of the economic realities of law practice by providing reasonable compensation. No case, or policy supports defendants' argument that class counsel's fee must be limited to a

percentage of the amounts claimed. To the contrary, the reasoned decisions have concluded that such an approach would lead to unpredictability, create enormous pressure for class counsel to settle at all costs and discourage the prosecution of meritorious claims.

Defendants' reliance on their "clear sailing" cases is misconceived since the district court conducted a thorough review of the settlement and specifically found no evidence of a strike suit or collusion. Moreover, there was no "clear sailing" because defendants breached the settlement agreement and vigorously opposed each aspect of class counsel's fee and expense request beginning the moment the jury was dismissed. Additionally, those cases do not permit a party to the stipulation to avoid his *own* agreement; to the contrary, all the cases preclude defendants' attempt at a partial rescission or reformation of their own settlement.

The deferred portion of class counsel's fee and expense award is freely assignable both under the express terms of the settlement as well as a matter of law — since restrictions on the right to receive money must be explicit, and even then such restrictions are disfavored, narrowly construed, or outright void under relevant law.

Argument

I. THE COURT SHOULD NOT PERMIT DEFENDANTS TO CONTEST THEIR OWN SETTLEMENT

Plaintiffs' motion — which has been "carried with the case" — for summary affirmance and sanctions based on a

lack of jurisdiction and frivolousness sets forth a number of interrelated doctrines (including standing, mootness, waiver and estoppel) that bar defendants' appeal from their own stipulation. Without repeating those arguments here, we make the following additional points.

First, defendants implicitly concede they have no standing by suggesting that the Court should review the fee award "*sua sponte* if necessary" to protect the interests of absent class members. (AB 58)[12]

Second, *even a class member* who fails to object to a fee award, and to intervene in the action, has no standing to appeal from such an award. *See In re Southeast Banking Corp. Secs. Litig.*, 51 F.3d 1003, 1004 (11th Cir. 1995); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987). Thus, *every* class member has waived any right to appeal the fee and expense award by not objecting and intervening. If an absent class member who was not a party to the stipulation lacks standing to appeal, a defendant who expressly agreed to the fee and expense award cannot assert the fiction that he is representing the interests of absent class members. That Grosfeld is in reality seeking personal gain at the expense of class counsel who created the fund only underlines defendants' legal cynicism.

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12. *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-361 (11th Cir. 1984) and *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 250-251 (4th Cir. 1971), cited by defendants merely state the well-established rule that a court — which *otherwise* has proper jurisdiction of an appeal — may consider other issues not raised below if necessary to prevent a miscarriage of justice.

Third, defendants' suggestion that they did not waive their right to appeal the district court's fee award is meritless. Defendants expressly agreed not to object "directly or indirectly" to the fee request in consideration for the cap on class counsel's fees. If defendants could not object, they obviously could not appeal; one must object to preserve an appeal. *See, e.g., Magicsilk Corp. v. Vinson*, 924 F.2d 123, 125 (7th Cir. 1991) (failure to object to fee award waived appeal). Thus, defendants by their agreement automatically waived their appellate rights. Defendants even told the district court they were *not* objecting. Moreover, defendants expressly agreed not to contest any provision of the settlement in any "judicial proceeding" and that doing so would constitute an "event of default" under the agreement. (R31-1371, Ex. F-3 at 4) This appeal is a "judicial proceeding." Any contrary holding would undermine one of the most basic policies underlying the enforcement of settlement agreements — namely, finality.

Fourth, the doctrine of "judicial estoppel" is singularly applicable here to enforce the "general rule that parties entering into stipulations during the course of a judicial proceeding are estopped to take positions inconsistent therewith." *Markow v. Alcock*, 356 F.2d 194, 198 (5th Cir. 1966) Defendants' baseless and personal attacks on the district court, made necessary by their duplicitous strategy, only highlight the doctrine's utility.

II. THE FEE AWARD WAS AN APPROPRIATE EXERCISE OF THE DISTRICT COURT'S DISCRETION

A. District Courts Have Broad Discretion In Determining The Reasonableness Of Class Action Fee Awards

Although defendants challenge the district court's exercise of discretion, they nowhere mention the cases or discuss the standards that guide this Court's review: "a clear showing of abuse of that discretion." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). Defendants also side-step appellate courts' aversion to imposing rigid rules on a district court's "broad discretion" to conduct a fairness review of a class action settlement, *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982), including the district court's award of class counsel fees: " 'Individualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility.' " *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F. 2d 768, 774 (11th Cir. 1991) (citations omitted).

Camden — which, as here, involved a *reversionary* settlement — held that district courts should base class counsel's fee award on a reasonable percentage of the fund created for the benefit of the class. The Court further instructed district courts to consider, among other things, the twelve factors set forth in the former Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

This Court's review is to be "informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett*, 737 F.2d at 986. Furthermore, the relevant facts must be reviewed "in the light most favorable to the lower court's approval of the settlement." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1145 (11th Cir. 1983).

B. An Unbroken Line Of Authority Holds That The Fee Properly May Be Based On The Gross Amount Of The Settlement Fund

In *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) (*Van Gemert I*), the Supreme Court held that class counsel's fee award should be measured by the size of the common fund established for the benefit of the class and not merely by the value of the claims eventually asserted against the fund:

> To claim their logically ascertainable shares of the judgment fund, absentee class members need prove only their membership in the injured class. Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorneys' fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs.

Id. at 480. Moreover, the Supreme Court noted that defendant may have a reversionary and "latent" interest in the funds, if

unclaimed, is irrelevant to the fee award. *Id.* at 481-482. Once the settlement fund was established for the benefit of class members, all class members held equitable interests in their respective shares of the fund. *Id.* In assessing fees, it was therefore proper for the district court to look at the entirety of the fund created for the benefit the class.

Relying on footnote 5 of the *Boeing* decision, defendants argue that *Boeing* is inapplicable because this case, they claim, involves a settlement where defendant merely provided "security" against allowable claims, whereas *Boeing* involved a judgment where defendant was unequivocally required to pay the full amount of the judgment pending the failure of class members to submit claims. Defendants ignore that this issue arose in the Supreme Court because defendant argued that taxing class counsel's fees against defendant's reversionary interest would constitute impermissible "fee-shifting." *Id.* at 477. The Court said that it need not decide whether the common fund doctrine would apply — meaning whether it would constitute impermissible fee-shifting — if defendant were required only to give security against potential claims. *Id.* at 479 n.5.

Defendants, however, fail to mention that six years before their settlement this Court rejected the notion that basing class counsel's fee award on the entirety of a reversionary settlement fund would constitute improper "fee-shifting." *Camden*, 946 F.2d at 771 n.2. *Camden* cited to the Supreme Court's *Boeing* decision for the proposition that persons who benefit from a lawsuit should contribute to its costs and held that class counsel's fee award should be based on a percentage of the fund created for the benefit of the

class. *Id.* at 771. The Court noted that the median of such awards tends to fall in the 20-30% range, with 50% being the upper limit, "although even larger percentages have been awarded." *Id.* at 774-75. The Court specifically held that the reversionary nature of the settlement was irrelevant to a determination of whether a common fund had been created for the benefit of the class. *Id.* at 771 n.2. The Court flatly rejected defendant's "fee-shifting" argument as having "no merit" and commented: "The settlement clearly created a common fund for the satisfaction of the County's liabilities." *Id.* at 771 n.2; *accord Skelton v. General Motors Corp.*, 860 F. 2d 250, 254 n.1 (7th Cir. 1988) (rejecting the argument that defendant's right of reversion in a class settlement changed the "common fund" analysis).

While nothing in *Camden* precludes a district court from *considering* the reversionary nature of a settlement, along with the *Johnson* criteria (just as the district court did), *Camden* clearly holds that there is nothing "improper" in basing the fee in a reversionary settlement on a percentage of the entire fund. Indeed, *Camden's* discussion of *Boeing*, and the inequity of class members being "unjustly enriched," suggests that it would be improper for a district court, in making its fee determination, to ignore the total fund created for the benefit of the class. There is no hint in *Camden* that this Court or the district court there, when evaluating the fee, was even aware of any claims filed against the fund (and it is unusual for a district court to have that information since fees are usually set at the time of the settlement fairness hearing, while the claims administration process, as here, usually goes on for months or even years afterward).

The Court could not adopt defendants' position — that a district court *must* await the tally of claims actually received against a reversionary settlement fund and award class counsel *only* a portion of the amount claimed by class members — without overruling *Camden*. Such a result would be particularly inequitable at bar, because it is Grosfeld who would get 90 cents of every dollar of the proposed reduction.[13] If *Boeing* and *Camden* teach us it is inequitable to "unjustly enrich" class members at class counsel's expense, it would be a legal and public policy travesty to do so for Grosfeld.[14]

There is also no rational basis for distinguishing a judgment fund which defendant must pay into court to satisfy any claims (as in *Boeing*) from a settlement fund which a defendant deposits with a third-party escrow agent to satisfy

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13. While Grosfeld notes that he will get the "larger share" of the reversion were this Court to follow his view of "Eleventh Circuit precedent," he fails to disclose how large. Only by tracing his explanation do we discover that. He seeks a fee reduction of $9.7 million, with $1 million going to the class and $8.7 million going to him. (AB 47 nn.16 & 17)

14. If this Court were to take the drastic step of overruling *Camden*, it should do so only prospectively, so as to avoid the gross inequity of Grosfeld profiting at class counsel's expense from his own calculated breach and from an unanticipated change in the law. If it was fair to base the fee award on the entirety of the fund in *Camden* (where any reversion would have gone to the County's public treasury), it is certainly fair to base the fee on the entirety of the fund in this case (where the reversion goes to Grosfeld who operated a telemarketing boiler room and who explicitly agreed to the fee being based on the gross settlement fund).

claims (as here and in *Camden*). In both cases, a common fund has been created to satisfy the defendant's obligation. In both cases, class members have a presently vested right to obtain a mathematically exact share of the fund by filing a claim. *See Boeing*, 444 U.S. at 479.[15]

Moreover, defendants' argument — concerning overreaching counsel and disproportionate fee awards — is the same misguided public relations argument which was initially adopted by the lower court in *Boeing* and then rejected by an *en banc* hearing of the court of appeal and later by the Supreme Court. *See Van Gemert v. Boeing Co.*, 573 F.2d 733, 735-36 (2d Cir. 1978) (criticizing large fee awards and holding that only the claimed portion of the fund could support a fee award) (*Van Gemert III*), *rev'd en banc*, *Van Gemert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978) (*Van Gemert IV*), *aff'd*, *Boeing Co. v. Van Gemert (Van Gemert V)*, 444 U.S. 472 (1980). The Supreme Court noted that the failure to tax a proportional share of attorneys' fees against the entire fund would result in a windfall to non-claiming class members at the expense of claiming class members and class counsel. The late Professor Newberg explained the

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15. Defendants' suggestion that no "true" settlement fund was created in this case because defendants merely provided "security" for their obligation is specious. It is irrelevant to the size of the recovery, and to the right of class members to receive their shares, whether the defendant funds the settlement fund with all cash (as in *Camden*) or a combination of cash and fully secured, interest bearing, promissory notes (as here). In either case, defendants' maximum liability is fixed by the amount of the fund and every class member is undeniably entitled to receive his or her mathematical share by filing a claim form, which defendants concede is "nothing unusual." (AB 46)

result as being based on the Supreme Court's repeated recognition "that the economic reality of class action litigation depends on the contingent prospect that counsel will create a substantial common fund recovery for the benefit of the class, from which counsel is entitled to receive reasonable fee compensation." 3 H. Newberg and A. Conte, *Newberg on Class Actions*, § 14.03 at 14-14 to 14-15 (3d ed. 1992) (discussing *Boeing* and the leading Supreme Court fee cases).

The Second Circuit *en banc* decision which the Supreme Court affirmed in *Boeing* provides an even more detailed discussion of why defendants' position is untenable. The *en banc* panel noted that a contrary rule would unduly penalize either claiming class members or class counsel. *Van Gemert*, 590 F.2d at 440-41. To award class counsel a reasonable fee bearing some proportion to their effort, courts would be forced to disproportionately reduce the share of claiming class members in order to cover a fee that could be taxed only against those claimants' shares. *Id.* On the other hand, protecting claiming class members by limiting class counsel to a fixed percentage of the fund actually claimed would make the resulting fee entirely dependent on the number of plaintiffs who came forward — notwithstanding the difficulty of the case, the quality of representation or the hours spent by class counsel — thereby potentially saddling counsel with a loss. *Id.* at 441.

The panel also noted that since the number of plaintiffs who will come forward to claim their shares is unpredictable, class counsel would be discouraged from bringing class suits, regardless of the merits of the case. The *en banc* panel concluded:

> To hold otherwise, we believe, would engender serious unfairness to claiming class members and their lawyers, without any corresponding benefit to absentees. Moreover, a contrary result would place enormous pressure on attorneys to settle at all costs, and would deter them from instituting meritorious suits.

590 F.2d at 435. Indeed, the element of predictability — stressed by the *Boeing en banc* panel — was one of the reasons this Court in *Camden* adopted the "percentage of the fund" approach in the first place. *See Camden*, 946 F.2d at 773 (citing that factor in a Third Circuit Task Force Report). Requiring class counsel's fee award to be based solely on the number of claims received — a factor over which class counsel has little or no control — would hardly promote "predictability." It would instead lead to the very problem envisioned by the *Boeing en banc* panel — undue pressure to settle cases at all costs.

Camden also noted that the "percentage of the fund" approach helps "to arrive at fee awards that are fair and equitable to the parties and that take into account the economic realities of the practice of law." 946 F.2d at 773 (quoting the Third Circuit Task Force Report) Adopting defendants' approach — which would require class counsel either to abandon meritorious claims prematurely or to risk a bankrupting loss — hardly accounts for the "economic realities of the practice of law." *See also Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (reversing as an abuse of discretion the district court's refusal to consider the full value of the $4.5 million

settlement fund in calculating an appropriate fee award — even though the claims totaled only $10,000 — and specifically noting that defendants had agreed to base the fee on the full amount of the settlement); *Koppel v. Wein*, 743 F.2d 129, 134 (2d Cir. 1984) ("It is immaterial to an award of attorneys' fees whether beneficiaries claim or accept the benefits obtained on their behalf . . ."); *Skelton*, 860 F.2d at 254 n.1 (rejecting the suggestion that a reversion clause in a class action settlement changes the common fund analysis, citing to *Boeing*); *Rosenfeld v. Collins & Aikman Corp.*, 1989 WL 150926 at *3 n.14; (E.D. Pa. 1989) (accord); *City of Ozark v. Trawick*, 604 So. 2d 360, 364-65 (Ala. 1992) (holding that a class member's individual decision not to claim against the fund cannot reduce the attorney's right to a fee based on the whole fund); 3 *Newberg* § 14.03 at 14-14 (noting that the *Boeing* rule applies even in a settlement where the "defendant reserves the right to recapture any unclaimed portion of the common fund after class members have had an opportunity to make their claims against the fund"); *See also id.* § 11.18 at 11-25 (noting it is "settled" that a fee award may be based "on the total potential benefit to the class," not just the amount of claims "actually exercised by class members").

C. The Settlement And Fee Agreement Were The Result Of Arms-Length Bargaining; Defendants' Mischaracterize The Process And Offer Only Speculative Hypotheticals With No Support In The Record

Citing no authority, defendants claim reversionary settlements are "very rare" and suggest that the idea of a

reversionary settlement was that of *plaintiffs*. Both propositions are untrue. It was defendants who raised and insisted on a reversionary settlement. (R35-1540 at ¶ 11) Plaintiffs agreed both because of defendants' insistence and because the settlement seemed fair under the law, the facts and the procedural posture of the case. (*Id.)*

As noted by Professor Newberg, reversionary settlements are one of several commonly accepted methods for dealing with unclaimed funds. 2 *Newberg*, § 10.15 at 10-38. Indeed, many of the leading cases discussing class action fee awards involved reversionary settlements. *Camden*, 946 F.2d at 771 n.2; *Skelton*, 860 F. 2d at 254 n.1; *In re Crazy Eddie Secs. Litig.*, 824 F. Supp. 320, 323, 326 (E.D.N.Y. 1993) (reversionary settlement where the court awarded $14.2 million in fees representing 33.8% of the gross amount of the $42 million settlement fund, plus $2 million in expenses, in a case where there was no trial). Several courts have held that absent an agreement to the contrary, unclaimed funds *should* revert to the defendant. *See* 2 *Newberg* § 10.17 at 10-40 n.124 (collecting cases). There is authority that even where the defendant's liability to the class has been proven, any unclaimed portion of the judgment amount should revert to the defendant and should *not* be distributed *pro rata* to class members who did file claims. *See, e.g., Van Gemert v. Boeing Co.*, 739 F.2d 730, 736 (2d Cir. 1984) (*Van Gemert VI*); *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815-816 (2d Cir. 1977) (*Van Gemert II*); *see also* 2 *Newberg* § 10.2 at 10-52. These cases reason that the equitable interest in the unclaimed funds belongs to the class members who have *not* claimed, and that class members who have claimed are no more entitled to those funds than is the defendant.

Appendix M

Defendants simply invent a fictional record on appeal and urge this Court to believe that plaintiffs could have and should have negotiated a different (they now suggest $20 million) *pro rata* settlement and defendants would then have agreed to forego claim forms and to adopt an automatic distribution to all class members. There is, of course, no evidence in the record to support any of defendants' self-serving speculations and hypotheticals. The agreement represents the best result each side could obtain after hard-fought settlement negotiations during a seven-year litigation and a five-month trial. The fact that defendants were able to insist on a reversion merely indicates their respective strength in the bargaining process. Since even the unclaimed portion of any judgment may have reverted to defendants, and since plaintiffs would have had to endure multiple appeals, and individualized rebuttal proceedings, before obtaining any enforceable judgment (and its attendant collection problems given Grosfeld's propensity to transfer assets), this settlement was in the best interests of the plaintiff class, as the district court found.

The district court's job in evaluating the fairness of the settlement was not to determine whether there might be some other, hypothetical settlement that might be *more* advantageous to the class, but which was never agreed upon. The district court's job was to evaluate the fairness of the settlement brought before it by the parties and to determine whether *that* settlement represented a fair compromise of the claims given all the attendant circumstances. Similarly, the district court's job was not to determine whether cutting class counsel's fee would be more advantageous to the class; in a common fund case, cutting class counsel's fee *always*

results in more money to the class (although here it is Grosfeld who stands to receive 90 cents of every dollar). The district court's job was to determine a fair and reasonable fee under all the circumstances of *this* case.

Moreover, class counsel in negotiating a class action settlement represents the interests of all class members, not just some subset of the entire class. There is no logical support, therefore, for defendants' assertion that class counsel "should have" negotiated a smaller, non-reversionary settlement under which class members who did file claims would benefit disproportionately to the class as a whole.[16] Class counsel cannot be faulted for negotiating a settlement under which every class member who filed a claim stood to receive the same proportion of his or her recognized loss as any other class member.

It is important to emphasize that while the size of the class was relatively large, the average pay-out to class members filing a claim ($1,200) seemed sufficiently large to provide filing incentive. (R35-1540 at ¶ 11; R35-1539 at ¶¶ 32-33) Indeed, it was a far larger average recovery than individuals typically receive in a class action. (R32-1481 at

16. The sole rationale offered by defendants is that — under the settlement at bar — defendants are entitled to a reversion even before claiming class members receive 100% of their alleged damages. As noted, courts reason that a defendant may be entitled to a reversion even where there has been a judgment. This reasoning applies equally in the settlement context — even if class members have not been fully reimbursed for all of their *alleged* damages — because, but for the defendants' agreement, there would be no obligation to pay "damages" at all, let alone 100% of any particular class member's alleged damages.

¶¶ 12-19) As Professor Newberg has noted, this factor typically results in a higher than average claim rate. *See* 2 *Newberg* § 11.18 at 11-24.[17] Defendants — while downplaying the benefit created by class counsel — readily admit that this settlement recouped a far larger percentage of out-of-pocket losses than the "2% to 10%" that class members typically receive in class settlements. (AB 25) And it is undisputed that the provisions providing a formula for the distribution of the net settlement fund, after the payment of counsel fees and expenses, according to class members' recognized losses, as well as the filing of proofs of claim, are standard and accepted procedures in a class action settlement. 3 *Newberg* § 12.35 at 12-90.

Although defendants had sufficient bargaining strength to negotiate a reversion to themselves, they would have this Court believe that they were forced into their agreement not to object to plaintiffs' fee application and that they were "concerned" about the alleged impropriety of negotiating the fee. (AB 26) This is sanctimonious nonsense; defendants wanted to cap the fee and were anxious to agree on this

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17. But for defendants' appeal from their own agreement, class members would have received in excess of 20% of their out-of-pocket losses. Class members will now receive 18.8% of their out-of-pocket losses because the district court has — according to the terms of the agreement — set aside additional funds for the potential payment of attorneys' fees on appeal. (R38-1558) Plaintiffs' counsel believes that such fees and expenses, if any, should not be taken from the settlement fund but should be assessed against defendants directly pursuant to Rule 34 in view of their frivolous appeal. We also note that defendants' efforts to limit claims have created two additional appeals which, if resolved against defendants, will increase the class recovery by approximately $2 million. (AB 2 n.3)

important economic term of the settlement. The cases have repeatedly recognized this reality of class settlements. *Evans v. Jeff D.*, 475 U.S. 717, 733-38 (1986); *Malchman v. Davis*, 761 F.2d 893, 905 n.5 (2d Cir. 1985). Counsel fees are typically the largest single claim against any class action settlement fund. A defendant in a reversionary settlement, therefore, cannot give up his right to object without getting value — an agreement by plaintiffs' counsel to limit the amount of the fee request.[18]

The negotiated fee-cap, of course, must also take account of what a "reasonable" fee would be; otherwise a defendant would have no incentive to agree to it. Stated another way, a defendant in a reversionary settlement, gains something by giving up the right to object, only if the cap is set below the highest fee award that the defendant believes the district court might reasonably allow. Following this lengthy litigation (almost five times the median duration of securities class actions in the Southern District of Florida (R32-1481 at ¶ 22)), the lodestar expense to both sides was enormous. Given this Court's decision in *Camden*, plaintiff's counsel could have requested a fee of up to 50% of the settlement fund. Defendants, therefore, bargained for, and obtained, a benefit to themselves by requiring plaintiff's counsel to cap their fee request.

The converse is true as well: plaintiffs' counsel gave something up — not only to defendants, but to the class. Plaintiffs' counsel gave up their right to request a larger fee

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18. Contrast this with a non-reversionary fund where a defendant can agree not to object to plaintiffs' counsel's fee request without giving up anything to himself.

— which if granted would, of course, have reduced the class members' recovery. Thus, there was a vigorous adversarial process taking place and arriving at what both parties agreed would be a reasonable and, here "non-objectionable," fee award.

D. No Case Has Ever Suggested, Let Alone Held, That The Fee Must Be Limited To A Percentage Of The Actual Claims

No case has ever adopted the rule advocated by defendants; namely, that a district court *must* await a determination of the number of claims filed against the fund and base class counsel's fee *solely* on a percentage of claims filed against the fund. And this case is worlds apart from any of the cases on which defendants rely.

In *Strong v. Bell South Telecommunications, Inc.*, 137 F.3d 844, 852 (5th Cir. 1998), a lodestar circuit, there was *no* common fund established. Instead, class members were to continue in a plan or receive credits for future telephone usage. *Boeing*, therefore, was inapplicable. Moreover, the court did award plaintiff's counsel an amount "which exceeded the lodestar figure plus costs." *Id.* at 851. Similarly, *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993), involved discount travel certificates that had to be claimed by class members and redeemed through travel agents. Class members had to spend hundreds of dollars on a ticket to be eligible to claim a credit. *Id.* at 308. Although the court did not agree with plaintiffs' counsel that the economic value to the class was the equivalent of the face-value of all the certificates, it awarded counsel a multiplier of 1.83 on their lodestar. *Id.* at 357.

Appendix M

In re Prudential Ins. Co. of America Sales Litig., 962 F. Supp. 572 (D.N.J. 1997), *aff'd in part, vacated in part*, 148 F.3d 283 (1998), also involved no presently determinable "common fund." The potential value of the settlement was dependent upon the success of Prudential's policyholders recovering monies in detailed Alternative Dispute Resolution ("ADR") proceedings against the company. *Id.* at 583. The value of the settlement fund — depending upon various outcomes — could vary by as much $800 million. 962 F. Supp. at 583. The court therefore adopted a bifurcated fee award giving class counsel an immediate fee award equaling 2.55 times counsel's lodestar and reserving the possibility of additional compensation that would result in a lodestar multiplier of 5.1. *Id.* at 592.

Duhiame v. John Hancock Mutual Life Ins. Co., 989 F. Supp. 375 (D. Mass. 1997) was precisely the same sort of complicated and unpredictable ADR determination, without a determinable "common fund." The court, therefore, set up a staged fee award, giving counsel an amount equaling 150% of their actual lodestar and holding additional amounts in escrow pending further order of the court. *Id.* at 380.

In *Wise v. Popoff*, 835 F. Supp. 977 (E.D. Mich. 1993), the court was faced with the very type of strike suit that the Private Securities Litigation Reform Act was meant to address. It was a "minimally sufficient" complaint, the equivalent of a U.S. Army " 'MRE' (Meal, Ready to Eat)," aimed at the corporate treasury and was over in 13 months producing a small class period for which the majority of shareholders could not even file a claim. The court noted that recovery to the class — not to defendants — would be

greatly increased by the reduction of attorneys' fees. Even though the court was highly critical of plaintiffs' counsel, it still awarded counsel a fee equaling their recalculated lodestar of $362,150.92. *Id.* at 982, 983.

Lyons v. Scitex Corp., 987 F. Supp. 271 (S.D.N.Y. 1997) was again a typical securities strike suit settled shortly after filing. The court rejected plaintiff's request for 33% of the settlement fund because it would have resulted in a multiplier of 6.06 times counsel's actual lodestar. *Id.* at 280. The court instead awarded a multiplier of 1.92 counsel's lodestar saying that it was appropriate in the case to adopt a "hybrid" of the percentage of the recovery method and the lodestar method. *Id.* Also, the court noted that attorneys' fees — unlike here — would reduce the class' recovery on a "dollar for dollar" basis. *Id.* at 279.

In *Bowling v. Pfizer, Inc.*, 927 F. Supp. 1036 (S.D. Ohio 1996), the court awarded class counsel a fee exceeding "the value of their services on an hourly basis by more than $6 million and impl[ying] a multiplier of well over two." *Id.* at 1042. The court merely refused to award class counsel a percentage of additional amounts that defendants were not required to pay into the fund until future years. The court instead awarded counsel future fees from future payments as they were made. *Id.* at 1043-44.

Goodrich v. E.F. Hutton Group, Inc., 1996 WL 76161 (Del. Ch. 1996), is a report filed by a chancery court in response to the Delaware Supreme Court's order that the chancery court justify its deviation from the United States Supreme Court's *Boeing* decision. The chancellor noted that

the action alleged the improper use by a brokerage firm of "float" on customer funds and that the greatest measure of damages that plaintiffs would have been able to prove at trial would merely have entitled members of the class to interest for *one additional day* on checks disbursed from their brokerage accounts during the relevant time period. (*Id.* at *1) The cost of making a claim to obtain one day's interest far exceeded the benefit available for making such a claim. (*Id.* at *2, 4) The Delaware Supreme Court's opinion, not cited by defendants, affirmed but also noted that — unlike here — class members did not have a "mathematically" fixed share of the fund because the settlement provided for reductions in their shares if claims under a certain amount were received. *Goodrich v. E.F. Hutton*, 681 A.2d 1039, 1048 (Del. 1996).

None of these cases, therefore, suggests that a district court must, or even should, await the filing of claims by class members and award only a percentage of the actual claims received. To the contrary, the courts in each case took an individualized and flexible approach to determining a reasonable fee under the circumstances of the particular case. And none of these cases, of course, permitted a defendant to benefit from a premeditated breach of his own settlement agreement.

E. No Case Has Ever Permitted A Party To Benefit From A Breach Of His Fee Agreement; Fundamental Contract Principles Prohibit Such A Result

All of the cases specifically addressing the issue at bar have held the defendant to his freely negotiated bargain. As

aptly stated by the court in *In re Copley Pharmaceutical, Inc. "Albuterol" Products Liability Litig.*, 1 F. Supp. 2d 1407 (D. Wyo. 1998):

> Under the terms of that settlement and its remittitur provisions, Defendant not only knew that class counsel would seek to recover fees based on the gross amount of the fund recovered (regardless of whether some part of that fund was not claimed), but also agreed to a mechanism and formula by which class counsel could do so. Thus, defendant cannot complain now that class counsel seek to do what the settlement agreement explicitly contemplates.

Id. at 1416; *accord, Williams*, 129 F.3d at 1027 (noting that the Supreme Court has held that in negotiating a class action settlement, the parties may properly agree on the payment of attorneys' fees and commenting: "The defendants here knew, because it was in the settlement agreement, that the class attorneys would seek to recover fees based on the entire $4.5 million fund .... *The Defendants had some responsibility to negotiate at the outset for a smaller settlement fund if they wished to limit the fees.*") (emphasis added).

These cases merely illustrate the fundamental proposition that settlement agreements are construed pursuant to general contract principles. While the district court was required to consider the fairness of the settlement and the reasonableness of the fee separately in order to protect the interests of class members, no legal principle permits

defendants, who were a *party* to the fee agreement, to modify or reform their stipulation of settlement so as to leave the settlement in place, but to rescind the fee agreement provision. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 726-28, 741 (1986) (reversing a court of appeals decision which had invalidated a negotiated fee waiver provision while allowing the remainder of the class settlement to stand); *Leverso v. SouthTrust Bank*, 18 F.3d 1527, 1534 (11th Cir. 1994) (disallowing a deviation from the express terms of a class action settlement noting: "It is well settled that a court cannot rewrite the terms of a contract in an attempt to make otherwise valid contract terms more reasonable for a party or to fix an apparently improvident bargain"); *Beecher v. Able*, 575 F.2d 1010 (2d Cir. 1978) (rejecting defendant's argument that the failure of class members to file as many claims against the settlement fund as originally anticipated should allow him to reform his stipulation to permit a reversion of the unclaimed funds).

While legal rubric varies, the fundamental point is that defendants cannot now seek partial rescission or reformation after obtaining the benefit of the settlement bargain — namely, removal of the threat of verdict, dismissal of the jury, settlement of the case, the substantial reversion which defendants already enjoy, and the negotiated cap on class counsel's fee. Return to the *status quo ante* is now impossible and therefore so is defendants' request for partial rescission or reformation. *See, e.g., Hibiscus Assocs., Ltd. v. Board of Trustees of Policemen and Firemen Retirement Sys.*, 50 F.3d 908, 917 (11th Cir. 1995) (no rescission unless prior conditions may be restored).

F. Defendants' "Clear Sailing" Cases Do Not Permit Them To Appeal From Their Express Agreement

Nothing in the "clear sailing" cases cited by defendants provides a basis for this Court to reverse the district court's fee and expense award. Those cases merely hold that a private fee agreement between the parties to a class action settlement does not obviate a district court's independent responsibility to review the reasonableness of a fee request. Those cases do not suggest that if a district court does, in fact, conduct an independent fee review that the *defendant* who entered into the agreement can then appeal the district court's determination and thereby avoid his *own* agreement.

Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991), was a meteoric derivative strike suit resolved in a few months with plaintiffs' counsel holding a lawful merger hostage and threatening the financial interests of the class — *i.e.*, shareholders who stood to benefit from the merger. Worse, plaintiffs' counsel, who was appealing, had hidden the "clear sailing" agreement from the district court, wrongly telling the court that the defendant had agreed to pay a specific — $2 million — fee, rather than disclosing that the defendant had merely agreed it would not object to a fee up to the specified amount. *Id.* at 524 n.7. The amount of the requested fee was in excess of three times counsel's lodestar. *Id.* at 529 n.13. Nothing in the First Circuit's opinion states that it is improper for class counsel and defendants to negotiate a fee agreement as part of a class action settlement. The First Circuit did recognize, however, that the presence of a "clear sailing" agreement where, as there, the "lawyers were in a position to coerce a fee agreement . . . regardless

of whether there was any merit to their claim," *id.* at 525, required the district court to closely scrutinize the reasonableness of the fee request since the normal adversary process, where the defendant objects, was lacking.

In *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), numerous *class members* had objected to, and appealed from, the district court's approval of the settlement and the fee award. The Second Circuit was concerned that the district court had performed only a cursory review. The Second Circuit nevertheless found no evidence of collusion and affirmed the district court's fee award. In doing so, the lead opinion of Judge Oakes was *actually critical* of the analysis of "clear sailing" agreements which defendants cite to in Judge Newman's concurring opinion, noting it was based on an unrealistic view of the settlement process:

> [W]here, as here, the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems to the author of this opinion that an agreement "not to oppose" an application for fees up to a point *is essential* to completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged. It is difficult to see how this could be left entirely to the court for a determination after the settlement.

Id. at 905 n.5 (emphasis added).

Defendants also cite *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) for the proposition that it is

improper simultaneously to negotiate a class action settlement and an agreement on class counsel's fee award. The Supreme Court rejected this notion in *Evans v. Jeff D.*, 475 U.S. at 733-38, noting as did Judge Oakes in *Malchman*, that it is essential to the completion of a settlement for a defendant to know his maximum exposure under the settlement. Indeed, in *Evans*, the Supreme Court rejected the argument that negotiation of fees as part of a class settlement had unfairly "coerced" a party into an unfavorable fee agreement. *Id.* at 728-29. To the extent that *Prandini* continues to have any force, it teaches only that district courts must ensure that any agreement on fees was not the result of a "collusive" settlement that traded away the rights of class members.

In this context, it is important to note that *Weinberger*, *Malchman* and *Prandini* were not "common fund" cases, but were instead "fee-shifting" cases where the attorneys' fees are paid directly by the defendant separate from any fund created for the class. In that situation, there is a very real danger that the defendant will agree to pay an unusually large fee in return for class counsel's agreement to a small settlement amount on behalf of the class. In a common fund case, class counsel's fees are in this Circuit "tied" directly to the size of the settlement fund negotiated on behalf of the class and, not as defendants argue, to the amount claimed. (AB 39, 45) Regardless of whether defendant objects to class counsel's fee request, class counsel can never receive an amount exceeding a reasonable percentage of the fund created for the benefit of the class. Class counsel, therefore, has incentive to negotiate for the largest fund possible. *See Camden*, 946 F.2d at 773-774 (noting this dynamic as a

beneficial feature of the "percentage of the fund" approach). Class counsel agreed to the cap on their fee request as part of the settlement documentation long before the parties even tried to agree on the actual amount of the settlement fund. This is the procedure which *Camden* expressly endorsed. (*Id.* at 773-74)

Further, defendants' "clear sailing" agreement was honored only in the breach. Defendants *did* oppose plaintiffs' fee and expense application beginning the moment the jury was dismissed. *See, e.g., In re Texaco, Inc.*, 90 Bankr. 622, 630 (Bankr. S.D.N.Y. 1988) (noting there was no "clear sailing" despite the agreement). The district court specifically found that the agreement was not the result of collusion, but that it had been negotiated vigorously at arms-length. *E.g., Duhaime*, 989 F. Supp. at 379 (noting no collusion despite "clear sailing" agreement). The fee and expense award represented not only a permissible percentage of the fund created (33-1/3%), it represented a permissible and modest "multiplier" of less than 1.1 on plaintiffs' lodestar — this after a seven-year litigation and millions of dollars of counsel's investment at risk.

Moreover, defendants' efforts to disclaim responsibility for protecting their own interests during settlement negotiations, and to characterize their agreement as the result of "coercion," bears comment. Defendants claim they were "concerned" with the alleged "impropriety" of their agreements at the time they entered into them. They did not, however, inform the district court of any of those alleged beliefs at the time they presented the proposal to the district court for approval. Nor did they ever raise this "concern" or

write a confirming letter in this most mistrustful of litigations. Further, while they apparently secretly believed that "few" class members would claim and that class counsel's fee would therefore prove disproportionate to amounts claimed, they did not disclose these alleged beliefs to the district court prior to dismissal of the jury. (R35-1540 at ¶ 12) And for good reason. Defendants plan was to settle the case and breach the fee agreement; their plan precluded making the district court doubt the *bona fides* of the settlement. Thus, defendants take the holdings of their "clear sailing" cases — designed to prevent collusive settlements aimed at harming the interests of absent class members — and pervert them beyond recognition in support of a premeditated breach of their own agreement.

Against this background of duplicitous dealings with the district court, defendants offer this Court no moral or policy reason to rescue them from their own agreement. They were happy to have the district court consider the full value of the gross settlement fund in determining the reasonableness and adequacy of the settlement, but they now ask this Court to consider only the amount of that fund actually claimed. Reduced to its essence, defendants' position is that they should be relieved of any responsibility for their own settlement negotiations and their representations to the district court. They wrongfully seek to characterize themselves as innocent victims who were the target of an unfounded strike suit (not only brought by plaintiffs, but by the CFTC and the NFA). In doing so, they hope to take advantage of the current political backlash against class counsel specializing in such suits. The district court properly saw through defendants' machinations, labeling them as

having "public relations appeal but [being] entirely contrary to law and to public policy." (R132-1518 at 85:13-15)

G. The District Court Properly Applied *Camden*

In making its fee determination, the district court not only addressed defendants' arguments, it also addressed each of the relevant factors set forth in this Court's *Camden* decision, including the twelve-point *Johnson* factors. The district court rejected defendants' unsupported assertion that reversions are "unusual." (R132-1518 at 85) The court found that adopting defendants' approach would discourage class action attorneys from undertaking difficult cases which could be prosecuted only at a loss. (*Id.*) The court noted that the case required an "abnormally high" expenditure of time and effort due to the novelty and complexity of the issues and the "unusually aggressive" defense. (*Id.* at 88) The court found that the case required a higher degree of skill than the average class action. (*Id.* at 89) The court found that class counsel was actively and continuously involved in the case to the point of being unable to devote any significant time to other matters. (*Id.*) The court found that the fee recoveries in comparable types of actions approximated 30% of the fund created for the benefit of the class. (*Id.* at 87) The court found that the contingent nature of the case created a substantial risk for class counsel — only two firms, one with only two lawyers. The court found that a recovery of out-of-pocket losses of between 20% and 30% represented "a substantial recovery for an investment-related class action," a factor which defendants apparently concede. (*Id.* at 91) The court specifically found that the actual dollars paid out would likely be substantially less than the full $40 million amount of the gross settlement fund, but that class counsel could not be

faulted for this possibility. (*Id.* at 91-92; R35-1544 at 6) The court found that class counsel were the only law firms who expressed a desire in prosecuting this difficult case at substantial risk to themselves. (R132-1518 at 92-93) The court found that settlement discussions were unusually difficult. (*Id.* at 93-94) The court also found that the case had fulfilled a public policy role in providing an avenue of redress for investors who had been defrauded through deceptive and high-pressure sales tactics. (*Id.* at 94) There is ample evidence in the record to support each of these findings which must be reviewed in the light most favorable to the district court's determinations, not according to defendants' self-serving recital of the facts.

Defendants' complaint about the quantity of material provided in support of plaintiffs' counsel's lodestar is a red herring since under this Circuit's "percentage of the fund" approach, a *detailed* lodestar analysis is no longer required. *See, e.g., In re Prudential Ins. Co. America Sales Litig.*, 148 F.3d 283, 342 (3d Cir. 1998) (approving of district court finding that detailed time summaries were unnecessary since the lodestar was merely being used to double check the percentage award); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246-47 (8th Cir. 1996) (reversing district court's denial of class fee award based on failure to provide time records since counsel reasonably believed the fee would be based on a percentage of the fund).[19] Plaintiffs' counsel

19. Indeed, it was in large part due to the substantial burden on district courts in reviewing detailed lodestar documentation that led this Court in *Camden* to adopt the "percentage of the fund" method for calculating fees. 946 F.2d at 773. *See also Court Awarded Attorneys' Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 246 (October 8, 1985).

supplied all the lodestar information that was requested by the district court and there was no evidence, or even serious suggestion, that counsel's lodestar figure of $12.6 million was inflated. (R132-1480 at ¶ 9; R33-1502 at Ex. B) Although defendants supplied no evidence of their fees for comparison, their admitted expenses exceeded those of plaintiffs by a substantial margin. Defendants' further complaint that counsel's lodestar was improperly stated using current hourly rates is meritless. *See Camden*, 946 F.2d at 775 n.7; *Skelton*, 860 F.2d at 255 n.5.

In sum, the only *evidence* offered in support of the alleged "excessiveness" of the fee award is the unfortunate fact that not as many class members filed claims as plaintiffs had believed would file claims. The district court specifically found that this fact was partially of defendants' creation (due to delaying tactics and efforts to prevent the remailing of class notices) and partly due to the district court's crowded docket (over which plaintiffs had no control). (R35-1544 at 6) The district court specifically found that it would be "highly inequitable" under the circumstances of this case to saddle class counsel with a multimillion loss for circumstances over which they had little or no control. (*Id.*)

While defendants assert repeatedly throughout their brief that the fee and expense award was "more than 400% of the amounts, relative to the class distributions, heretofore awarded by the courts of the Eleventh Circuit," there is absolutely no evidence in the record to support this assertion other than defendants' alleged *ex parte* telephone survey which the district court found was self-serving "hearsay" in direct contradiction with defense counsel's prior

representations. Indeed, the district court confirmed its understanding of the methodology used in the NERA report by calling one of the authors of the report personally. (*Id.* at 3-4) Moreover, defendants' suggestion that there were no unclaimed funds in any of many settlements contained in the NERA survey lacks credibility on its face. It is well recognized that class action settlements *usually* result in unclaimed balances, the disposition of which is left in the district court's discretion. *See, e.g., Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (noting that "[m]ost class actions result in some unclaimed funds," and discussing the various alternatives used by courts for distributing such funds). Defendants' failure to cite to *Camden*, a reversionary settlement, is illustrative.

Even assuming any validity to defendants' survey, however, and its 400% figure, defendants did not consider that this seven-year litigation was some five times the median duration of securities class actions filed in the Southern District of Florida (R32-1481 at ¶ 22), went to a five-month jury trial, posed two much smaller firms (one with two lawyers) against at least six law firms who unnecessarily prolonged the litigation, and was much more difficult to prove than a securities fraud-on-the-market case. Thus, while defendants' "statistical" notion (if proven) might have been of some interest in a different context, it is meaningless against the long torturous history of this case and the day-to-day realities faced by the district court, a court which defendants would now marginalize with attacks on its integrity.

III. THE EXPENSE AWARD WAS ALSO APPROPRIATE

The district court initially denied virtually all of class counsel's claimed expenses, agreeing with defendants that insufficient backup material had been provided to the court. Class counsel expressly asked the district court what materials it would like to review since documentation for each invoice in a seven-year litigation would fill many boxes. (R132-1518 at 98-101) The district court requested and received an affidavit from class counsel and from class counsel's controller — and class counsel brought their controller to court for examination and further offered to provide the district court with backup material for any questioned item. (*Id.* at 182-184; R34-1521; R34-1522; R34-1526) The district court conducted two additional hearings on the expense application, and allowed or disallowed items on a category-by-category basis. (R133-1535, R134-1534) The district court ultimately disallowed in excess of $200,000 of requested expenses, notwithstanding that defendants' expenses exceeded those of plaintiffs by a substantial margin.

Defendants' further complaint that the expense award as a percentage of the fee award is larger than that in most other cases ignores that few class actions are ever litigated through trial. *See* 3 *Newberg* § 12.55 at 12-122. Expenses obviously mount over time and increase relative to fees once the cost of a trial must be absorbed. *Cf. Crazy Eddie*, 824 F. Supp. at 323, 326 (awarding $2 million in expenses and over 33% of a $42 million reversionary settlement fund in a case that never went to trial).

IV. THE FEE AND EXPENSE AWARD IS ASSIGNABLE AS A MATTER OF LAW

Although the record demonstrates that defendants agreed the fee and expense award would be assignable (*supra* at 20-21), it is unnecessary for the Court to reach that issue to affirm the district court's order. According to defendants' view, the agreement was "silent" as to whether the fee and expense award was assignable. (AB 26) The agreement expressly states that it is to be construed according to Florida law (R31-1371 at ¶10.13), and under Florida law it is well established that contractual rights are freely assignable unless the agreement *expressly* provides otherwise. *Hall v. O'Neil Turpentine Co.*, 47 So. 609 (Fla. 1908); *L.V. McLendon Kennels, Inc. v. Investment Corp. of S. Florida*, 490 So. 2d 1374-75 (Fla. 3d DCA 1986). Silence equals free assignability under Florida law. *See also Classic Concepts, Inc. v. Poland*, 570 So. 2d 311, 313 (Fla. 4th DCA 1990). Even express restrictions are construed narrowly. *Cordis Corp. v. Sonics Int'l, Inc.*, 427 So. 2d 782, 783 (Fla. DCA 1983) (" 'The law draws a distinction . . . between performance due under a contract and assignment of the right to receive contractual payment.' "). In fact, even express restrictions on assignment of the right to receive payment are void in Florida under the UCC. *Florida First Nat'l Bank v. Fryd Constr. Corp.*, 245 So. 2d 883 (Fla. 3d DCA 1970); Fla. Stat. § 679.318(4).[20] Thus, regardless of Grosfeld's

20. Defendants' response to the clear language of the UCC is to quote a commentary explaining why *specifically enumerated* transactions, not relevant here, were excluded from the Code's otherwise comprehensive coverage. Defendants' *ipse dixit* is that (Cont'd)

claims about his intent, counsel's deferred obligations must be freely assignable.

Moreover, defendants lack standing to contest the assignability of the fee and expense award since the settlement agreement expressly provides that it is an obligation of class members to be paid by the settlement administrator from the settlement fund, and not an obligation of defendants. (R31-1371 at ¶ 7.3) Defendants' obligation remains precisely the same regardless of whether class counsel assign the right to receive payments from the settlement fund to a third party. Defendants' position reduces to hypertechnical spite.

Finally, defendants have not bothered to address the rational in the Court's March 25, 1997 order on this issue. (R33-1515)[21]

(Cont'd)
the deferred obligations are "*sui generis*," part of a litigation settlement, and therefore not part of a commercial financing transaction. But they are. As one respected commentator observes, "[t]he sale of streams of payment arising out of structured settlements is big business," B. Clark. *Lump-Summing Structured Settlements and Other Payment Streams: Selected Legal Issues*, Clarks' Secured Transactions Monthly, August 1997; *cf. In re Hayes*, 168 BR 717 (Bankr. D. Kan. 1994) (discussing the assignment of structured settlement payments as creating security interests under the UCC).

21. The "assignability" issue was exhaustively briefed in plaintiffs' reply on pending motion for sanctions and summary affirmance. Given space limitations, plaintiffs respectfully refer the Court to that briefing.

Appendix M

CONCLUSION

The Court should affirm the district court's orders in all respects and award sanctions against defendants and their counsel.

Dated: October 20, 1998

Respectfully submitted,

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APPENDIX N — MOTION OF PLAINTIFFS-APPELLEES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF TO ADDRESS ONE MISTATEMENT IN DEFENDANTS-APPELLANTS' REPLY BRIEF DATED NOVEMBER 30, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5074

WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

vs.

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,

Defendants-Appellants.

MOTION OF PLAINTIFFS-APPELLEES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF TO ADDRESS ONE MISTATEMENT IN DEFENDANTS-APPELLANTS' REPLY BRIEF

Appendix N

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Appendix N

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with F.R.A.P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 27-1, undersigned, counsel state that the following are interested persons and entities:

Gary S. Anderson (Counsel for Appellees/Plaintiffs)
Linda Bartholomew
(Appellee/Plaintiff, Class Representative)
R. Lawrence Bonner (Counsel for Appellants/Defendants)
Victor F. Caldwell (Counsel for Appellants/Defendants)
Justin Y.K. Chu (Counsel for Appellants/Defendants)
Certified Class of MultiVest Options, Inc. for Customers
(Appellees/Plaintiffs)
John L. Cooper (Counsel for Appellees/Plaintiffs)
Copart, Inc.
Cravath, Swaine & Moore
(Counsel for Appellants/Defendants)
The Cypress Group, Inc. (Appellant/Defendant)
Paul M. Dodyk (Counsel for Appellants/Defendants)
Farella Braun & Martel LLP
(Counsel for Appellees/Plaintiffs)
Neil A. Goteiner (Counsel for Appellees/Plaintiffs)
James Grosfeld, individually and as Trustee of the Jason Grosfeld Trust (Appellant/Defendant)
Nancy Grosfeld (Defendant in Conveyance Litigation below)
Homer & Bonner (Counsel for Appellants/Defendants)
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Appendix N

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MultiVest, Inc. (Appellant/Defendant)
MultiVest Real Estate, Inc. (Appellant/Defendant)
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S.S. Melbourne, Inc. (Appellant/Defendant)
Michael R. Siebecker (Counsel for Appellants/Defendants)
The Honorable Ursula Ungaro-Benages (Trial Judge below)
Steven C. Wasinger (Counsel for Corporate Defendants below)
William Waters (Appellee/Plaintiff, Class Representative)
C. Brandon Wisoff (Counsel for Appellees/Plaintiffs)

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PLEASE TAKE NOTICE that before the Eleventh Circuit Court of Appeals, Elbert P. Tuttle Court of Appeals Building, 56 Forsyth Street, N.W., Atlanta, Georgia, 30303, plaintiffs-appellees ("plaintiffs") hereby move the Court pursuant to 11th Cir. R. 27-1 (c)(10) and (d), for permission to file the accompanying supplemental two page brief to address one of defendants-appellants' ("defendants") misstatements in which defendants claim that a declaration filed *after* the case was closed, was part of a motion before the district court. The misstatement is material to this Court's jurisdiction to hear this appeal. Plaintiffs previously asked defendants to correct this misstatement in their brief to obviate any further motion practice. Defendants declined to do so, declined to point out where they believed that plaintiffs were mistaken on the facts stated in plaintiffs' supplemental brief, and declined to consent to plaintiffs filing the supplemental brief.[1] Plaintiffs are therefore constrained to file this motion to correct defendants' misstatement.

Defendants agreed to settle this class action and that they would not object to a fee request of one-third of the total settlement fund plus expenses (Plaintiffs' Brief, pp.20-22 collecting record citations). Defendants did not take any issue when the district court stated on the record on March 31, 1997 that defendants had assured the court in chambers during preliminary approval discussions, and before the jury was dismissed, that: "a fee of one-third of the gross amount of the settlement fund would be well within the range of reasonable." (Plaintiffs' Brief, p. 28, quoting R132-1518 at 42:10-18).

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1. *See* correspondence between parties' counsel, attached collectively as Exhibit A to the accompanying November 30, 1998 declaration of Neil A. Goteiner.

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Defendants now in their Reply Brief repeatedly claim for the first time that they did deny the district court's March 31, 1997 in-court statement (Defendants' Reply Brief, pp.6, 22, 24,25-26). Defendants also claim that plaintiffs' assertion that defendants did not deny the court's statement, was "false." (Defendants' Reply Brief, p. 24). To support their claims, defendants quote what they characterize as their "promptly" filed declaration of Paul Dodyk, "in support of" defendants' Fed. R. Civ. P. 52(b) and 59(e) motion, filed on April 21, 1997. (Defendants' Reply Brief at pp. 6, 24).

The record, however, is that *defendants never suggested that the district court was incorrect until after the court closed the case.* Plaintiffs' Supplemental Brief demonstrates *specifically* that: (*a*) defendants did *not* file this quoted Dodyk declaration "in support of ," or in connection with, any motion, (*b*) defendants filed the quoted Dodyk declaration on *May 9, 1997*, not on April 21 (R35-1546) (defendants do not provide the date of the quoted declaration in their Reply Brief); and (*c*) defendants filed their quoted Dodyk declaration (dated May 8) *after* receiving the district court's May 8, 1997 *faxed* Order denying defendants' Rule 52/59(e) motion, and the district court's May 8, 1997 Order closing the case (R35-1544, R35-1545).

Plaintiffs' Supplemental Brief also demonstrates that Mr. Dodyk did serve and file before the case was closed a declaration in support of defendants' Rule 52(b)/59(e) motion, a declaration in which he also stated that he had reviewed the March 31 transcript. (R34-1532, ¶¶ 1,18). This April 24 Dodyk declaration, however, did *not* refer at all to the district court's March 31 statement, which defendants now say they denied.

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The Court's clear understanding of what defendants told the district court before the jury was dismissed regarding defendants' support of plaintiffs' requested fee, and the related chronology of the district court's on-the-record statements and defendants' silence, is material to the Court's review of this appeal. Indeed, defendants have conceded that their response to the district court's March 31 statement, and their effort to demonstrate that that March 31 statement mischaracterized the record, is critical to their right even to be before this Court.[2]

Pursuant to 11th Cir. R. 27-1(a)(3), plaintiffs also refer the Court to: (1) defendants' prior September 9, 1998 motion to supplement the record with declarations of defendants' counsel, (2) this Court's October 6, 1998 Order instructing defendants *inter alia* not to include in the appeal materials outside of the district court record, and (3) the Court's November 4, 1998 Order *inter alia* striking appellants' October 13, 1998 corrected brief.[3] Contrary to their merits Reply Brief, defendants in their September 23, 1998 reply brief in support of their September 9 motion to supplement

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2. Defendants acknowledge that silence in response to the district court's statement that they supported plaintiffs' fee request, would be: "an admission which is obviously highly prejudicial;" the "obvious effect of the court's statement is to undermine defendants' appellate position in a manner which is immune from effective appellate review." (Defendants' October 16 Opening Brief, at 31).

3. Also on November 4, the motions panel granted defendants' motion for a 7 page extension of page limitation for defendants' Reply Brief, resulting in defendants' 32 page, 11 point type, printed brief.

the record, attempted to explain why they should be allowed to file these declarations because defendants had *not* "litigated" below the district court's statement about defendants' support of plaintiffs' fees (*Id.* pp. 3-4). Defendants proceeded on September 23 to explain to the motions panel that since the district court's order of May 8, 1997: "*concluded* the district court's proceedings with respect to the amount of plaintiffs' counsel's fee, defendants *had no subsequent opportunity or reason* to address that issue further below." (*Id.* at 13, emphasis added). Similarly defendants in that same September 23 reply brief noted that: "the court's passing reference to the matter in the hearing of March 31, 1997 *merited no response* because that observation was irrelevant to the issue before the Court." (*Id.* at n.4, emphasis added).

And yet in their merits Reply Brief, defendants now claim that they did respond to the district court's March 31 statement as part of their April 21 motion, and now offer Mr. Dodyk's declaration filed on May 9, after the case closed, to support their claim.

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CONCLUSION

Plaintiffs respectfully request that the Court grant this motion for leave to file a supplemental brief and that the Court accept the accompanying supplemental brief for filing.

Dated: November 30, 1998

Respectfully submitted,

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By: s/ Neil A. Goteiner
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Attorneys for Plaintiffs
WILLIAM WATERS and LINDA BARTHOLOMEW and those similarly situated

APPENDIX O — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING APPELLEES' MOTION TO FILE A SUPPLEMENTAL BRIEF DATED AND FILED DECEMBER 22, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-5074

WILLIAM WATERS; LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

versus

INTERNATIONAL PRECIOUS METALS CORPORATION; MULTIVEST INCORPORATED; *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ORDER:

Appellees' motion for leave to file a supplemental brief is DENIED.

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX P — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR WRIT OF MANDAMUS DATED AND FILED APRIL 17, 1996

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

IN RE:

JAMES GROSFELD,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Middle District of Florida

BEFORE: KRAVITCH, ANDERSON and BIRCH, Circuit Judges.

BY THE COURT:

Multivest, Inc. and International Precious Metals Corporation's "joinder" in the Petitioner Grosfeld's petition for writ of mandamus, construed as a motion to adopt this petition, is GRANTED.

Petitioner's petition for writ of mandamus is denied.

APPENDIX Q — EXCERPT FROM THE NATIONAL FUTURES ASSOCIATION MANUAL, VOLUME SIX, NUMBER TWO (AS OF JANUARY 1, 2000)

NATIONAL FUTURES ASSOCIATION MANUAL

VOLUME 6, NO. 2
(AS OF JANUARY 1, 2000)

NATIONAL FUTURES ASSOCIATION

200 W. Madison Street
Suite 1600
Chicago, IL 60606-3447
(312) 781-1300

120 Broadway
Suite 1125
New York, NY 10271
(212) 608-8660

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* * *

Appendix Q

[¶9021] COMPLIANCE RULE 2-9: SUPERVISION OF TELEMARKETING ACTIVITY (Board of Directors, January 19, 1993; revised August 14, 1996; December 16, 1996 and March 10, 1998.)

INTERPRETIVE NOTICE

Over the years, NFA's Board of Directors has adopted strict and effective rules to prohibit deceptive sales practices, and those rules have been vigorously enforced by NFA's Business Conduct Committees. The Board notes, however, that by their very nature, enforcement actions occur after the customer abuse has taken place. The Board recognizes that NFA's goal must be not only to punish such deception of customers through enforcement actions but to prevent it, or minimize its likelihood, through fair and effective regulation.

One NFA rule designed to prevent abusive sales practices is NFA Compliance Rule 2-9. This rule places a continuing responsibility on every Member to supervise diligently its employees and agents in all aspects of their futures activities, including telemarketing. Although NFA has not attempted to prescribe a set of supervisory procedures to be followed by all NFA Members, NFA's Board of Directors believes that Member firms which are identified as having a sales force that has received questionable training in sales practices should be required to adopt specific supervisory procedures designed to prevent sales practice abuse. Rule 2-9 authorizes the Board of Directors to require Members, which meet certain criteria established by the Board, to adopt specific supervisory procedures designed to prevent abusive sales practices.

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The Board believes that in order for the criteria used to identify firms subject to the enhanced supervisory requirements to be useful, those criteria must be specific, objective and readily measurable. The Board also believes that any supervisory requirements imposed on a Member must be designed to quickly identify potential problem areas so that the Member will be able to take corrective action before any customer abuse occurs. The purpose of this Interpretive Notice is to set forth the criteria established by the Board and the enhanced supervisory procedures which are required of firms meeting these criteria.

In developing the criteria, the Board concluded that it would be helpful to review Member firms which had been closed through enforcement actions taken by the CFTC or NFA for deceptive sales practices. The Board's purpose was to identify factors common to these Member firms and probative of their sales practice problems, which could be used to identify other Member firms with potential sales practice problems.

One factor identified by the Board as common to these firms and directly related to their sales practice problems is the employment history and training of their sales forces. For many of these Members, a significant portion of their sales force was previously employed and trained by one or more of the other Member firms closed for fraud. The Board believes that the employment history of a Member's sales force is a relevant factor to consider in identifying firms with potential sales practice problems. If a Member firm is closed for fraud related to widespread telemarketing problems, it is reasonable to conclude that the Member's training and

supervision of its sales force was wholly inadequate or inappropriate. It is also reasonable to conclude that an AP who received inadequate or inappropriate training and supervision may have learned improper sales tactics, which he will carry with him to his next job. Therefore, the Board believes that a Member firm employing such a sales force must have stringent supervision procedures in place in order to ensure that the improper training its APs have previously received does not taint their sales efforts on behalf of the Member.

The Board has determined that a Member will be required to adopt the specific supervisory procedures over its telemarketing activities if:

- for firms with at least five but less than 10 APs, 40 percent or more of its APs have been employed by one or more Member firms which have been disciplined by NFA or the CFTC for sales practice fraud ("Disciplined Firms");

- for firms with at least 10 but less than 20 APs, four or more of its APs have been employed by one or more Disciplined Firms; or

- for firms with at least 20 APs, 20 percent or more of its APs have been employed by one or more Disciplined Firms.

For purposes of this requirement, a Disciplined Firm is defined very narrowly to include only those firms that meet the following three criteria:

1. the firm has been formally charged by either the CFTC or NFA with deceptive telemarketing practices;

2. those charges have been resolved; and

3. the firm has been closed down and permanently barred from the industry as a result of those charges.

Attached is a list of firms currently meeting the definition of a Disciplined Firm. Although this list is current as of the date of this Interpretive Notice, NFA will provide Members with updated lists as necessary.

Any Member firm meeting these criteria will be required either to operate pursuant to a guarantee agreement or maintain an adjusted net capital of at least $250,000 for the entire period during which the Member is required to tape record its sales solicitations. Any Member opting to maintain the higher level of adjusted net capital would also be subject to the financial recordkeeping and reporting requirements applicable to FCMs. Eligible guarantor futures commission merchants are those that meet the eligibility requirements for executing a Supplemental Guarantor Certification Statement pursuant to NFA Registration Rule 504(a)(2)(B).

Those Members meeting the criteria will be required to tape record all telephone conversations that occur between their APs and both existing and potential customers. The Board believes that tape recording these conversations provides these Members with the best opportunity to monitor closely the activities of their APs and also provides these

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Members with complete and immediate feedback on each AP's method of soliciting customers. Members meeting the criteria must tape record these conversations for a period of two years and must retain such tapes for a period of five years from the date each tape is created and the tapes shall be readily accessible during the first two years of the five-year period. In retaining the tape recorded conversations, Member firms must catalog the tapes by AP and date. Additionally, any Member firm meeting the criteria must require all its APs to maintain a daily log for sales solicitations which reflects at a minimum the identity of each customer or prospective customer the AP spoke with on each day. A Member firm must be able to promptly produce, upon request from NFA or the CFTC, all conversations relating to a specific AP, and only that AP, for a given date.

In addition, for a period of two years, those Members meeting the criteria will be required to file all promotional material, as defined in NFA Compliance Rule 2-29(g), with NFA at least 10 days prior to its first use.

If an NFA Business Conduct Committee disciplinary proceeding or Commodity Futures Trading Commission enforcement proceeding has been filed against a Member firm required to adopt these enhanced supervisory procedures, then the enhanced supervisory procedures will remain in effect for the applicable time period specified or until after the disciplinary or enforcement proceeding is closed and all appeals are completed or the time for appeal has passed without an appeal being filed or perfected, whichever occurs latest. Member firms shall be required to retain tapes for the five-year period as specified above.

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Any Member required to adopt these enhanced procedures may seek a waiver of the enhanced supervisory requirements. NFA may grant such a waiver upon a satisfactory showing that the Member's current supervisory procedures provide effective supervision over its employees, including enabling the Member to identify potential problem areas before customer abuse occurs.

A Member firm that does not comply with this Interpretive Notice will violate NFA Compliance Rule 2-9 and will be subject to disciplinary action.

FIRMS THAT HAVE BEEN DISCIPLINED FOR SALES PRACTICE FRAUD

1st Commodity Corp. of the Carolinas
Alpine Financial Corp.
American Futures Group Inc.
Apache Trading Corp.
Arnekay Inc.
Atlantic Futures Inc.
Atlantic Mercantile Group Inc.
Bear & Wolf Company, Inc.
BP Financial of Boston Inc.
Bachus & Stratton Commodities, Inc.
Carrington Financial Corp.
Chicago Commodity Corp.
Chilmark Commodities Corp.
Churchill Group Inc.
Commodity Fluctuations Systems Inc.
Commonwealth Financial Group Inc.
Diversified Trading Systems Inc.

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Dunhill Investments Corporation
Durkin & Associates Inc.
England, Mark W.
Financial Services Group Inc.
First Commodity Corporation of Boston
First National Monetary Corp.
First Sierra Corporation
Futures Financial Advisors of Palm Beach
Gabriel Brokerage Inc.
Gemini Investments Inc.
Grandview Holding Corp.
Great American Commodities Corp.
Index Services Inc.
International Futures Strategists, Inc.
International Trading Group Ltd.
Investment Syndication Corp.
JCC Inc.
Jones Commodities Inc. D.E.
Masters Trading Organization Ltd.
Montgomery International Trading Inc.
Multivest Options Inc.
Murlas Commodities Inc.
Nationwide Futures Corp.
Neiman-Lloyds Inc.
Option America Inc.
Preferred Commodity Corporation
Premex Inc.
Presidential Futures Inc.
Stephens E. David Commodities Corp.
Stirn, Barry Gerald
Tara Securities Corp.
Trinity Financial Group Inc.

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Waters Tan & Co. Inc.
Wellington Financial Group Inc.
Whitehall Investors International Inc.
Wolf Commodities Corp. Inc.
Zipkin, William L.

* * * *